Case and Comment
THE LAWYER'S MAGAZINE

VOL. 20 FEBRUARY 1914 No. 9

Are Judgments for Personal Injuries Provable Claims in Bankruptcy?

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EVER since the bankrupt law has been in force there has been considerable doubt in respect to the provability of claims arising *ex delicto*.

Section 63 provides for all debts that may be proved and allowed against bankrupt estates.[1] This section enumerates five classes of provable debts, but contains no provision referring expressly to tort claims. It is clear that if such claims may be allowed, they must fall within one of the classes specified in that section.

Unliquidated claims sounding in tort, and not based on contract, have uniformly been held not to come within any of these classes, and consequently are not provable in bankruptcy. But where the claim arises *ex delicto*, and is also of such a character as to constitute a claim on the theory of a quasi contract, it is provable under clause 4 of § 63 as a contract debt.[2]

Where a claim for damages for tort has been reduced to judgment before the petition is filed, is the judgment a provable claim in the bankruptcy proceedings? It manifestly does not come within any provision of § 63, unless it is the first clause. If it is a "debt," which is a "fixed liability . . . evidenced by a judgment," it is within that provision, and is provable. Such a claim is certainly a fixed liability evidenced by a judgment. This is true of all judgments for a definite sum of money. Is such judgment evidence of a debt within the meaning of the bankrupt act? Upon the answer to this question depends its provability.

The ruling word in § 63 is "debts."

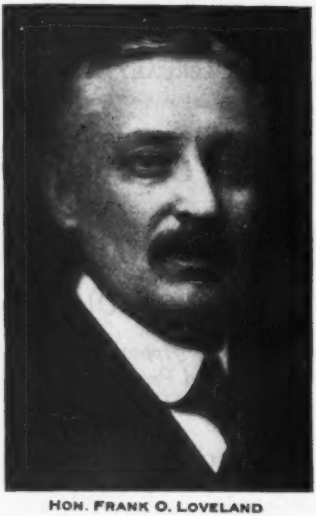
[1] Dunbar v. Dunbar, 190 U. S. 340, 350, 47 L. ed. 1084, 1092, 23 Sup. Ct. Rep. 757, 10 Am. Bankr. Rep. 139; Wetmore v. Markoe, 196 U. S. 68, 72, 49 L. ed. 390, 391, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265, 13 Am. Bankr. Rep. 1.

[2] Crawford v. Burke, 195 U. S. 176, 193, 49 L. ed. 147, 153, 25 Sup. Ct. Rep. 9, 12 Am. Bankr. Rep. 659; Frederic D. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332, 21 Am. Bankr. Rep. 484.

The classification is only a means of describing "debts" of the bankrupt which may be proved and allowed against his estate. It has been held that a judgment for a fine or penalty,[3] a judgment for alimony,[4] and a judgment for seduction or support of bastard child[5] are not "debts" within the meaning of this section, and for that reason are not provable in bankruptcy.

In Wetmore v. Markoe,[6] the supreme court, speaking of a judgment for alimony, said:

"The precise question therefore, is, Is such a judgment as the one here under consideration a debt within the meaning of the act? The mere fact that a judgment has been rendered does not prevent the court from looking into the proceedings with a view of determining the nature of the liability which has been reduced to judgment."



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It does not follow from these cases that a claim for damages in tort is not a debt. They do, however, establish the fact that a judgment does not change the nature of the liability or create a new debt, and that the court may look behind the judgment to determine "the nature of the liability which has been reduced to judgment." If a claim for damages in tort is a debt, a judgment founded on the claim is provable. If it is not a debt, the judgment is not evidence of a debt, and therefore not provable under clause 1 of § 63.

A claim for damages for personal injury may be a liability, and not be a debt within the meaning of the bankrupt act. A debt under that act may be said, generally, to include any liability of the debtor growing out of an express or implied agreement or contract, which is fixed at the time the petition is filed. Debts in bankruptcy are regularly those growing out of business transactions.

At first the bankruptcy laws dealt only with "traders." Such laws have been extended to include other classes of business men, but they have always been confined to the business affairs of men. The purpose of all of them is "to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes."

The present act does not seem to deal with claims for damages for personal injury, either as a liability or an asset of an estate in bankruptcy. It enumerates the classes of debts provable against a bankrupt estate, but it does not expressly mention among them claims for torts, either before or after liquidation. Rights of action for injury to the person or feelings of the debtor do not pass to his trustee as a part of his estate.[7] Actions

[3] Re Morse, 111 Fed. 145, 6 Am. Bankr. Rep. 590; Re Sutherland, Deady, 416, Fed. Cas. No. 13,369.

[4] Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735, 5 Am. Bankr. Rep. 829; Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265, 13 Am. Bankr. Rep. 1.

[5] Re Cotton, Fed. Cas. No. 3,269.

[6] 196 U. S. 68, 72, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265, 13 Am. Bankr. Rep. 1.

[7] Re Haensell, 91 Fed. 355, 1 Am. Bankr. Rep. 286; Sibley v. Nason, 196 Mass. 125, 124 Am. St. Rep. 520, 81 N. E. 887, 12 Ann. Cas. 938, 22 Am. Bankr. Rep. 712, 12 L.R.A.(N.S.) 1173, Cleland v. Anderson, 66 Neb. 276, 92

for injury to his property alone pass to his trustee under § 70, cl. 6. Congress evidently intended the bankruptcy courts to administer the property of a debtor to pay his business obligations, *i. e.*, his contractual debts, without regard to claims by or against him for personal torts.

In Audubon v. Shufeldt,[8] Mr. Justice Gray, speaking for the Supreme Court holding the claim not provable, said: "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife."

If a judgment for damages founded on negligence, without being "wilful and malicious," is a provable claim, it is released by a discharge under § 17. Suppose two persons are injured by the same negligent act, and one obtains, and the other does not obtain, a judgment before the bankruptcy of him committing the act of negligence. The result would be that the judgment creditor could receive a dividend, and the balance of his judgment would be released by a discharge; while the other could not prove his claim, which would be a continuing liability against the bankrupt. This is not equitable. It gives to one an advantage over the other. Which one gets the advantage depends upon the size of the dividend paid and the subsequent prosperity of the bankrupt.

Claims for damages for personal injury are not unusual as the records of our courts plainly show. If Congress intended to include these claims in the settlement of bankrupt estates, it would have been easy to use words to express that intention. On the contrary, Congress seems to have done what it could, without prohibiting them in express terms, to indicate an intention not to permit liquidated or unliquidated claims for personal torts to be proved or allowed against a bankrupt estate.

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N. W. 306, 96 N. W. 212, 98 N. W. 1075, 105 N. W. 1092, 11 Am. Bankr. Rep. 605, 5 L.R.A. (N.S.) 136.

[8] 181 U. S. 575, 577, 45 L. ed. 1009, 1010, 21 Sup. Ct. Rep. 735, 5 Am. Bankr. Rep. 829.

Early Bankrupt Laws.

The first law resembling in any marked degree a bankrupt law, as it is understood at the present time, is found in the Roman law of cession—*cessio bonorum*. It was introduced by Julius Caesar, and provided that if a debtor yielded up all his fortune to his creditors he was secured from being dragged to a gaol "*omni quoque corporali cruciatu semoto*."

The bankrupt law was an innovation on the common law. The English system of bankruptcy was borrowed directly from continental jurisprudence. "We have fetched," said Lord Coke, "as well the name as the wickedness of bankrupts from foreign nations." The English word bankrupt is derived from the Italian, *banca rotta*, meaning a broken bank or bench.—Loveland on Bankruptcy, pp. 2, 4.

GOOD ADMINISTRATION

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Preventive Compositions

or

Compositions that will Forestall Bankruptcy

A suggestion for an amendment to the U. S. Bankruptcy Act.

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OUR national bankruptcy law has been in operation for more than fifteen years, a period four years longer than the life of any previous United States bankruptcy law.

Is its success assured? Are its enemies silenced forever, or are they only biding their time?

It behooves the friends of the measure who believe that a complete system of bankruptcy legislation mutually adjusted to the interests of creditors and debtors should be permanently incorporated in the jurisprudence of every country occupied in trade and commerce, to exercise constant vigilance in improving the law and adapting it to its great purpose of conserving the healthy commercial life of the people.

Our country is not an isolated province, but a great commercial nation engaged with every country on the globe in a world-wide commerce, ever increasing, in an age of marvels when there seems no impossibility even in the poet's vision of

"The heavens filled with commerce, argosies of magic sails,
Pilots of the purple twilight, dropping down with costly bales."

Its needs are not peculiar to itself, but the common needs of all peoples engaged in commerce.

In the study, then, of the legislative experiments of other countries, we may find something helpful in the solution of our own problems.

The objection that has ever been brought against bankrupt laws, and in too many instances with reason and justice, was the waste and expense of all proceedings in bankruptcy.

England's great chancellor, Lord Eldon, "took the first occasion of expressing strong indignation at the frauds, committed under cover of the bankrupt laws, and his determination to repress such practices. Upon the subject his lordship observes with warmth that the abuse of the bankrupt law is a disgrace to the country, and it would be better at once to repeal all the statutes than to suffer them to be applied to such purposes. There is no mercy to the estate. Nothing is less thought of than the object of the commission. As they are frequently conducted in the country, they are little more than stock in trade for the commissioners, the assignees, and the solicitor. Instead of solicitors attending to their duty as ministers of the court, for they are so, commissions of bankruptcy are treated as matters of traffic. No worse conspiracy can be than that, the object of which is to make what the legislature intended as a lenient process against the bankrupt, a mode of defrauding the creditors and the bankrupt." (6 Ves. Jr. 1.)

It is not our purpose to discuss here how effectually this objection has been met and obviated by the United States bankruptcy act of 1898. If evils still exist, remedies will doubtless be devised. It is not to be presumed that abuses of this character will be permitted to bring into disrepute and jeopardy a measure so beneficent in its scope and intent as our national bankruptcy law.

Our present purpose is to inquire whether any preventive measures have been discovered by which the honest debtor on the verge of failure may be restored to commercial health without resort to the heroic treatment of a bankruptcy proceeding.

In theory a debtor may always treat with his creditors, and effect some satisfactory arrangement with them, but in practice this is usually impossible, for the consent of all the creditors is necessary, and there are usually some who either from malice or to secure some advantage to themselves will withhold their consent.

The United States bankruptcy law of 1898 makes provision whereby a debtor may offer terms of composition to his creditors, but only after he has been adjudged a bankrupt with the consequences which such adjudication entails of an impaired or ruined credit, and a business wrested from his control and perhaps disorganized or destroyed, when to extricate himself from his difficulties and retrieve his fortunes he needed, perchance, only a little forbearance and immunity from the danger of a premature confiscation of his property by a bankruptcy proceeding or by the suits of his creditors.

Laws in Switzerland, Belgium, England, and France provide for what may be called "a composition that will forestall bankruptcy," or what in French parlance is known as *un concordat préventif*, or preventive composition. This is an arrangement by which bankruptcy proceedings may be avoided, and the relations between an unfortunate debtor and his creditors satisfactorily adjusted without subjecting him to the humiliation and ignominy of being adjudged a bankrupt.

The laws on this subject mark an important stage in the gradual breaking down, by more enlightened sentiments of humanity, of the severity of ancient bankrupt systems, which was deemed necessary to preserve a high standard of commercial morality. They are intended for the benefit of those debtors who are the victims of misfortune rather than of their own reckless or fraudulent conduct.

The object of these laws is stated to be threefold. In the first place to protect the unfortunate and innocent debtor by affording him a means of escape from bankruptcy with the harsh consequences which it involves. The second purpose of the law is to protect the creditors against exorbitant or even dishonest claims of others of their number. Liqui-

dation according to the provisions established by law, on account of the expense and delay incident thereto, is sometimes ruinous to the creditors. It is often as desirable for them as for the debtor that there should be an arrangement by which the latter might himself liquidate his estate under agreed conditions. Finally, the third object of the law is to encourage the debtor who is on the verge of bankruptcy not to wait as long as he frequently does before making known his true situation, and to endeavor to come to an arrangement with his creditors. The debtor who apprehends bankruptcy, in order to escape it, contracts ruinous loans, or engages in speculation; then he calls his creditors together and seeks to conclude an arrangement which is nearly always impeded by some of them; to keep off the most exacting, he pays them to the prejudice of the estate, and the most accommodating are not paid. The actions brought against the debtor burden him with enormous expenses and annihilate his credit. In spite of all he does not escape bankruptcy, and numerous lawsuits are then necessary to establish equality among the creditors in recovering the sums paid to the injury of the estate. It is hoped that when the debtor knows that there exist some protective measures, he will not wait so long and resort to these maneuvers, and that he will address himself as soon as possible to his creditors, and endeavor to obtain under the supervision of the court, a composition that will forestall bankruptcy.

The following is a brief summary of the salient features of these laws: A debtor who finds himself unable to meet his obligations may address a petition to the court showing the facts upon which he bases his petition, a schedule of his assets, a list of his creditors, with the amount of their claims, and his propositions for a composition with his creditors. If the court is satisfied that the debtor has acted in good faith, it will submit the propositions to the creditors, which, when accepted by a certain proportion of them, and confirmed by the court, become binding on them all. The debtor is exempt from suits, and is not deprived of his property or the conduct of his business, which is continued under the supervision of the court.

The degree of control and the mode of its exercise will naturally vary in different jurisdictions and be a subject for careful adaptation to their respective needs.

We have grown accustomed of late years to the spectacle of a business being organized and reorganized under judicial control, where, because of its great size or monopolizing tendency, it is suspected of being a public menace. There would be nothing novel therefore in the extension of this principle to a business large or small, in whose management, through the temporary embarrassment or incapacity of its guiding spirit, the public may deem itself to have acquired an interest.

The higher the grade of duties assigned to the courts, the greater, it is hoped, may be the incentive to watchful care in the selection of their constituent elements. "An ounce of prevention is worth many pounds of cure" in that department which our Constitution makes the depository of the "judicial power" of the state, and which, in "a government of laws, not men," must ever be of transcendent importance.

Little Switzerland, whose immunity from war has enabled her to experiment in the acts of peace with so many valuable results, has been a pioneer in this field.

The Genevese laws of July 7, 1877, and December 2, 1880, subsequently replaced by a Federal law upon bankruptcy for all Switzerland containing an institution of the same nature, establishes the precedent for the Belgian law of June 30, 1883, organizing the *concordat préventif*. Disregarding details, and viewing the subject broadly, we find many points of similarity between the Belgian *concordat préventif*, and the provision in the English bankruptcy act of 1883, as amended by the act of 1890, for a "composition or scheme of arrangement," which may follow the "receiving order," and prevent an adjudication of bankruptcy. In France the same principles found expression in the law of March 4, 1889, ordaining what is known as "judicial liquidation."

The Genevese law declares that any trader who is prevented from meeting his engagements may, in order to avoid the declaration of bankruptcy, demand from the Tribunal of Commerce a respite in order that he may propose to his creditors the terms of a composition. Accompanying his demand, there must be deposited at the office of the clerk of the court a balance sheet setting forth the names of the individual creditors, their residences, and the sums due them, his regular daily accounts, and a petition addressed to the Tribunal, signed by the demandant and approved in writing by the majority in number and value of his creditors, not including privileged creditors or those secured by mortgage. After examining these papers, the Tribunal either grants or refuses the respite. If it is granted, the Tribunal delegates one of its members to exercise a supervision over the operations, and appoints a commissioner. Dating from this judgment which must be properly advertised, all suits and executions against the debtor, with some exceptions, are suspended. During the period from the judgment pronouncing the respite to the confirmation of the composition, the debtor may make no transfer of his property nor perform any act that will affect the condition of his estate, without express authorization from the commissioner. In case the debtor violates these provisions, the commissioner will report the fact to the Tribunal, and it may of its own motion, declare the bankruptcy, after the debtor has been heard or summoned.

The commissioner forthwith proceeds to make an inventory of the assets, and takes the necessary measures to protect the interests of the creditors, and to continue the business of the debtor, if it seems expedient. The liquidation of the assets may be commenced only after the meeting of the creditors, with the consent of the judge-delegate, and the debtor. The law regulates in detail the procedure to be followed in the verification of claims. The formation of the composition requires the consent of a majority in number of admitted creditors representing three-fourths of the total value of the claims admitted absolutely or provisionally, and under pain of nullity must be signed by the debtor and creditors at the same meeting. Although the composition has been voted by both the requisite majorities, it will not be operative until it has been confirmed by the Tribunal, and if this is refused after hearing the objections of the parties interested, bankruptcy will be declared.

When duly confirmed, it binds without exception, all interested parties.

The cancelation of the composition after confirmation may be obtained from the court, or pronounced of its own motion in certain specified cases.

So soon as the composition has been confirmed, the functions of the commissioner and judge delegate cease. The expenses and disbursements of the operations of the respite, including the emoluments of the commissioner, are privileged claims against the estate.

A *résumé* of the more important provisions of the Belgian law upon preventive compositions follows: A commercial debtor may escape the declaration of bankruptcy, if he obtains from his creditors a composition of this kind in the forms and under the conditions prescribed by the law. It requires the consent of a majority in number of the creditors, representing three fourths of the claims, not contested or admitted provisionally, and to become operative must have the confirmation of the Tribunal of Commerce, which will only be granted in favor of the unfortunate debtor who has acted in good faith.

The debtor addresses a petition to the Tribunal of Commerce of his domicil, with a statement of the facts upon which he bases his petition, a detailed estimate of his assets, a list of his creditors with their residences and the amount of their claims, and his propositions for a composition.

If the Tribunal decides to entertain the petition, it appoints a time within the fortnight following, for a meeting of the creditors, and delegates one of its members to examine into the situation of the debtor, preside at the meeting of the creditors, and exercise a general supervision.

While the negotiations are pending, the debtor is exempt from suits and executions on the part of the creditors.

During this period, however, he may neither alienate nor mortgage his property, nor enter into any engagements without the authorization of the judge delegate. The judge delegate appoints, if there is reason for so doing, one or more experts, who, after taking oath, proceed to verify the condition of the debtor's affairs. Their fees which are determined by the Tribunal of Commerce become privileged claims. The debtor must deposit with the clerk of the court the sum necessary to cover the expenses of the meetings and advertising. When the creditors meet, the judge delegate renders his report, and the debtor formulates his propositions. The creditors, having presented their claims, proceed to vote upon the composition. At any time during these proceedings the Tribunal may declare the bankruptcy, if it becomes convinced that the debtor is not innocent and the victim of misfortune. The composition, when confirmed by the court, binds all the creditors.

In England, where a judgment of sequestration or "receiving order," as it is called, depriving the debtor of possession, but not devesting him of the legal title to his property, is preliminary to an adjudication of bankruptcy, the debtor may apply for a composition before he has been adjudged bankrupt, but not after a bankruptcy suit has been begun.

By the law of 1883, as amended by the act of 1890, it is provided that where a debtor intends to make a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, he shall, within four days of submitting his statement of affairs, or within such time thereafter as the "official receiver" may fix, lodge with the "official receiver" a proposal in writing signed by him, embodying the terms of the composition or scheme which he is desirous of submitting for the consideration of his creditors, and setting out particulars of any sureties or securities proposed.

In such case the "official receiver" shall hold a meeting of creditors before the examination of the debtor is concluded, and send to his creditors before the meeting a copy of the debtor's proposal with a report thereon, and if at that meeting a majority in number and three fourths in value of all the creditors who have proved, resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors, and, when approved by the court, shall be binding on all the creditors.

The provisions of a composition or scheme may be enforced by the court, on application of any person interested, and any disobedience of an order of the court on the application, shall be deemed a contempt of court.

By the previous law of 1869, in England a composition might be concluded by a debtor with a majority of his creditors before bankruptcy which would be obligatory upon all. The negotiations were free from all judicial control. Not even the confirmation of the court was required, the legislature taking the view that insolvency was a matter of private concern solely, and consequently any control of a public authority was to be only tolerated and reduced to a minimum. It was the creditors themselves who were to investigate the conduct of the debtor and the cause of his insolvency. Provision was made for the registration of the composition, it is true; but the duty of the clerk of the court was merely to notice whether the necessary formalities had been complied with.

Although by this arrangement, the creditors often received but a small part of their claims, nevertheless, it was generally preferred on account of the expense and slowness of ordinary bankruptcy. Statistics show that from 1870 to 1877, these arrangements and compositions formed five sixths of the total number of cessations of payment. Furthermore compositions and arrangements were steadily increasing, while declarations of bankruptcy were decreasing.

The frauds which this system left undiscovered and unpunished, and the meager dividends yielded to the debtors' estates were among the causes that induced the legislation of 1883, subsequently amended in the interest of economy by the act of 1890.

The 1874 amendment to the United States bankruptcy law of 1867 permitted a composition before a debtor had been

adjudicated a bankrupt, but this act also contemplated that the composition proceedings should follow a bankruptcy suit commenced.

Incomplete in scope as were the provisions as to composition proceedings, they were declared by the court to have furnished a large measure of relief to the debtor and assenting creditors (Re Scott, 15 Nat. Bankr. Reg. 73, Fed. Cas. No. 12,519), and at the time were generally regarded as the best feature of the law.

In France, in the proceeding known as "judicial liquidation," which, like the others mentioned, is intended to be a substitute for bankruptcy in certain cases, the legislature has attempted to define more clearly than does the Belgian law, the respective spheres of action of the debtor, on the one hand, and the officials placed over him on the other.

In the laws, which we have had under consideration, the supervision over the debtor varies from no control at all in the English law of 1869, to a control resting almost entirely in the discretion of the court as in the Belgian law, where the debtor may apparently be deprived of all freedom of action.

One of the chief merits of the preventive composition is the fact that the debtor does not undergo a dispossession of his goods.

In bankruptcy both creditors and debtor usually suffer from the transfer of the estate to a syndic or trustee. Apart from the remuneration which he must receive for his services, the estate is often damaged by his inefficiency and mismanagement, since he may be a man with but little experience in the control of a large business.

The person best qualified to conduct the liquidation of the estate, so that it will yield to the creditors the largest possible dividends, is usually the debtor himself. But the advantage to be derived from his management may be, to a large degree, neutralized by a too broad or vaguely defined supervision placed over the debtor by the law. How to realize one of the main purposes of such a law, namely, to retain the debtor in the management of his business, and at the same time impose upon him such restraints as the interests of the creditors and the public may demand, would form an appropriate subject for legislation. Happily, in this country, a sane and intelligent cooperation of government and business seems nearer to realization than ever before.

May our national bankruptcy law continue to enjoy smooth sailing, but if the breakers are again encountered, her pilots may welcome a gleam from friendly lights across the wave, to aid them in steering a safe, yet progressive, course!

S. Whitney Dunscomb, J.

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GOVERNMENT

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Systematic Law Reform

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THE law of England and America resembles a sailing vessel built many years ago and gradually repaired and altered as inventions and discoveries have been suggested. For a while, for a long while, the old sailing vessel as repaired from time to time satisfied her owners, but the advent of the modern scientific view point was to the law what the discovery of the steam engine was to mechanics. Now, therefore, the old sailing vessel, though supplied with an engine and propeller, reminds us only too often that she was built for no such propulsion. To carry the simile a little further; we may calk and repair the old hulk so as to keep her quite seaworthy (that is to say we may keep abreast of the times in matters of substantive law), but try as we may, we cannot increase her speed to the rate at which a modern vessel ought to travel,—in other words, upon the basis of the old procedure we cannot build an efficient scientific method.

In criminal cases the situation is indicated by the fact that in one year (1910) for which statistics were collected by Josiah Strong, less than 2 per cent of the homicides committed in the United States were followed by convictions, while in Europe, the convictions ranged from 50 per cent to 95 per cent (Germany). In civil cases there is no test, except general opinion, to show us whether or not correct findings are arrived at by judge and jury, but the respect in which the legal machinery is held, the confidence and alacrity with which citizens go to law are indications. Lawyers know that an alarming num-

ber of verdicts are unjust; that the legal machinery creaks loudly; that it is often difficult to explain to intelligent clients the logic and justice of certain practices. And it is common knowledge, among both lawyers and laymen, that perjury, prejudice, poverty, and technicality often defeat just causes. Many are the articles written, many the bills introduced into legislatures to combat these enemies of right, but the remedies suggested are usually mere patches upon glaring abuses. Is it not now pertinent to inquire what basic faults these abuses spring from, and whether it would not pay to treat the whole subject of procedure as a laboratory problem?

In the past it has been deemed sufficient for jurists to say that the Anglo-American law is a historical growth, and it has been assumed that reform must be gradual and specific, as it has been in the past, instead of general and radical. This, of course, is largely true. But we are growing more and more radical in our legal reforms. The Torrens land law, the interstate commerce laws and tribunals, the referendum, the popular initiative, the recall of judges, the probation system, are rather more than patches.

This new art is trying itself out in minor and more modern parts, but the time is coming when the older and more important foundations will have to be razed in response to the call for logical organization. The constructive lawyer has many handicaps. I have pointed out in a previous article ("The Effect of the Imitative Instinct on the Common Law," American Law Review, Nov.-Dec. 1903, vol. XXXVII, No. 6) the difficulty of overcoming the inertia of custom, and in another article ("Law-Making Forces," American Law Review, Sept.-Oct. 1913) the pressure of self-interest which interferes with the establishment of an ideal *corpus juris,* but even with these limitations it is still possible to plan a practical, comprehensive system as distinguished from one which consists mainly of a series of afterthoughts.

The reform of procedure may be accomplished more radically and more quickly than the reform of substantive law, because the selfish interests of the various lawmaking classes or forces are not so directly affected (see article on Law-Making Forces, supra), and because a sudden change in the substantive law would upset the layman's conceptions of legal right and wrong so much as to produce confusion and embarrassment, whereas the layman knows little of procedure and bases hardly any act of daily life upon it.

It is not my purpose here to attempt the Herculean task. The work calls for patient preparation, long study, and slow, careful elaboration, but there are certain striking anomalies which would appear to an investigator with the modern scientific spirit in his first fragmentary outline of an ideal procedure. With no pretensions to finality, and certainly without claim of completeness, but only to suggest how such a method would lead to the revelation of weakness, let me indicate what I mean by working out a rough tentative scheme of civil procedure, endeavoring to eliminate ruthlessly mere traditional principles, and to build with the tools and materials which modern social conceptions and modern science and critical experience have approved.

Construction of New Procedure.

The first step is to state the problem, which may be said to be the attempt to discover the true state of facts in a legal controversy between two or more parties, with as little delay, inconvenience, and expense as are consistent with efficiency, and to select and apply the most appropriate remedy.

We should now review all the means used in the systems of all countries to accomplish these ends, and study each one with a view to discovering how it works in practice, and how well it is adapted to local conditions. It will be found that, both logically and practically, many European provisions are superior to American methods, and that numerous expedients have been adopted there to correct the flaws which we have allowed to remain in our systems.

Secondly, we should tabulate the discoveries in psychology, the critical and constructive suggestions of economic philosophers, and the complaints of liti-

gants, judges, and lawyers which concern our present subject.

Bearing all the above in mind, we should build into a consistent and harmonious structure, the new procedure.

Obviously the tabulative work involved in the process outlined cannot be done, or even summarized, in this article, but so far as possible must appear by its effect on the final suggestions.

These suggestions are now in order, and, fragmentary as they are, had better be given in consecutive form.

A. Pleadings.

(1) The first act of a civil suit should be the service of process on the defendant, giving the names of the parties, return day, court, nature of the claim, and a set of questions about the action which he requires the defendant to answer.

(2) At the same time the plaintiff files in a sealed envelop a complete statement of his case, giving his exact claim, with dates, places, documents, accounts, and relation of all details within his knowledge.

(3) The defendant on the return day files a statement of all the facts which are within his knowledge or which he can learn in answer to the questions in (1), and in addition makes a detailed statement of his defense, giving dates, places, documents, accounts, etc., as required of the plaintiff. This is filed in a sealed envelop. The defendant at the same time files a set of questions which he requires the plaintiff to answer.

(4) The plaintiff files sealed answers to the defendant's questions.

Commentary.

Declarations with formal wordings should be abolished, because the form of declaration requiring certain elements to be stated often indicates to the defendant that the plaintiff is in ignorance, in doubt, or in error on some points, and permits the defendant to take advantage of such ignorance, doubt, or error in ways that will be readily suggested to the practical trial lawyer. The statement of the nature of the case (given according to the rights of action prescribed by the substantive law) and the questions propounded enlighten the defendant sufficiently for this stage. If the defendant's sealed answer (3) is not full enough to warn the plaintiff of the defense, it is the plaintiff's own fault as a rule; if, through accident, the questions do not bring out the defense, it will be made clear at the preliminary hearing. (7) It is provided hereinafter (11 and 12) that the general denials and pleas of ignorance work a forfeiture if not true, and the plaintiff, wishing a statement on any point, has merely to ask about it.

The formal declaration is clearly an anachronism, and is so recognized in equity, where bills of complaint, though covering the most technical and specific actions, may nevertheless be expressed in natural language.

The information required in the sealed statements may be adapted from the French *ecritures preliminaires* and other European preliminary papers, though these documents are not used in the above manner.

B. Preliminary Hearing.

(5) The matter is referred to a judge. A jury is impaneled, consisting in the lower court of two, in the upper court of twelve, members.

(6) The judge and jury in secret session open and read the sealed and other pleadings.

(7) The parties and counsel are called in. The judge, not being limited by technical rules, asks any questions that occur to him with the purpose of finding out the true facts, clearing up doubtful points, and asking such questions, the answers to which will be easily disproven if false, by the documents and other strong evidence which the judge knows of, but which the interrogated party may not know about. The pleadings are then handed to counsel to be read, and thereafter remain public. The case is then adjourned to a day certain for trial.

Commentary.

The jury of the two members sitting with the judge is suggested by the German Court of Lay Assistants, which is formed in just this way, for the trial of minor criminal causes. The separation of judge and jury in our practice is no doubt a remnant of class distinction, the

original idea being that the representative of the King should not mingle too familiarly with the common people. But the place of the judge, after the trial, is in the jury room. He is the expert, the man of tried probity and intelligence. It is he who should guide the laymen into the paths of right reasoning, right application of the law, and right ethical spirit. We all know that the average jury (though the common sense and aggregate human experience of its members often gives it a shrewdness in attacking a proposition which the judge sometimes lacks) is more often than not influenced by puerility, prejudice, and misunderstanding of the law. Pure laziness, open dishonesty, and personal friendship, freely expressed, are also to be met with. Against these the presence of the judge is an invaluable antidote.

Nor is the influence of the jury on the judge to be disregarded in its tendency to make him more human, more sensitive to the complex forces and perceptions of ordinary life. That his dignity will stand the shock is very probable. That the state can stand the expense of sending a judge out with every jury is also likely, seeing that impoverished little countries like Italy can afford to have three judges sitting at each trial in the higher criminal courts.

The preliminary hearing and adjournment (7) is a common incident to most European courts, and also the duty of the judge to question the parties at this time. This right of examination is also very broad in its scope, being limited only, it would seem, by his opinion of what is necessary to accomplish its purpose. Thus, much desirable evidence which would be barred out by our rules is admissible, and it must be borne in mind that many of our rules of evidence sacrifice the best source of information on account of the necessity of limiting parties and counsel by arbitrary bounds so as to keep the trial down to convenient length. No such restriction is needed in the case of a judge, who may be trusted to confine himself automatically within a reasonable time allotment.

C. Trial.

(8) On the day of trial, the witnesses are kept in a room to which no one else is admitted but the court officer, and no witness is readmitted after testifying. The witnesses are called to the stand, one by one, and each testifies in the absence of the others, being examined first by the judge, then by each counsel.

The provision of (8) as to keeping witnesses *incommunicado* is not an innovation, being practised in Europe and even by our next-door neighbor, Canada. It is in fact one of the utmost desirability. All practising lawyers know that the most baffling element of a fraudulent case is the way in which the witnesses "coach" themselves by hearing previous testimony. By keeping them separate, they can almost invariably be made to fall into traps of inconsistency with previous testimony. It is admitted that the judge under our law has power to exclude persons from the court-room, but how often is this right exercised? Immemorial custom and human lethargy have made the provision a dead letter.

(9) Scientific matters, such as nature of injuries, mental condition, physical signs, adulteration of food, and psychological problems capable of solution, may be referred by the judge on his own motion or that of counsel to a scientific expert attached to the court, whose report may be made at once, or the case continued until he is able to report.

The need of a scientific assistant attached to the court as provided in (9) is being felt more and more. Such an appointee would be an impartial investigator, a person to whom the jury and judge might look for unbiased views when bewildered by the maze of partisan experts. Indignant litigants could have their rights presented without the present necessity of engaging high-priced specialists. And above all, the holder of the office would have splendid opportunity and occasion for developing the branch of psychology which deals with mental operations on the witness stand, a science which Professor Munsterberg has hinted at in a book, the echo of whose title can be found in this sentence,—it is perhaps too early to advocate the use of the sphygmograph in court, but it is not too early to direct the attention of jurists to the possibilities of the infant science which uses it as a tool. Tests of per-

ceptive faculties of witnesses, of their memory peculiarities, of their capacity for giving true accounts of events, should be systematized and administered not by counsel, but by the trained, unprejudiced scientist.

(10) The evidence being in, the counsel argue and the judge charges the jury, exceptions being taken for determination by the full bench.

(11) The judge and jury then retire together to the jury room, and proceed to determine the facts. If they find unanimously that any material written statement made by the plaintiff is false and made with knowledge of its falsity, the plaintiff loses. If any material fact or document is found to have been intentionally concealed, the same results follow. The jury votes secretly, the judge openly.

(12) If any material written statement made by the defendant is found to be knowingly false, the plaintiff not having made one, the defendant loses, the vote being taken as in (11). Similarly, if the defendant, being called upon by the law or the interrogatories, intentionally omits or conceals anything, he forfeits his case.

(13) If no forfeiture is worked as in (11) and (12), the jury and judge vote on the issues. If all the jurymen are unanimous, or the judge and a majority of the jurymen vote together, the finding stands. As in (11) and (12) the jurymen vote secretly, the judge openly.

Commentary.

In (11) and (12) a suggestion rather startling to the common lawyer's mind is made. What! Throw a litigant out of court because he has claimed a little more than he can prove, or kept silent about a little surprise which he intended to spring on the other side! How unreasonable!

Yet how much more unreasonable, how infamous, it is to allow and even approve of falsehood and evasion by judge, jury, and witness. The judge knows that he is overruling a case. Why does he try so pathetically to prove that he is really following precedent? The attorney knows that his client never paid the plaintiff's bill. Why is he permitted to allege that the bill is paid? The client himself knows that the bill is not paid. Why is he permitted to go into court without being forced to state in writing and definitely that he has paid nothing? True, interrogatories may be put before trial. With what result? If a question does not cover the exact and essential issue in the case and the answer is false, proven to be false at the trial, the offending party may yet win his case notwithstanding he has misled the other side into confusion and prevented a proper preparation of the case. And though he may be punished for perjury he knows that prosecutions of this kind are as rare as grateful clients.

Every writer has taken a fling at the legalized falsehoods called fictions and though they are deplored more or less universally; so modern a jurist as Professor J. C. Gray says: "Fictions of the dogmatic kind are compatible with the most refined and most highly developed systems of law. Instead of being blameworthy, they are to be praised when skillfully and wisely used."[1]

On the contrary I feel that a misrepresentation in a court of justice is inexcusable under any name, and when practical should be treated with prompt and rigorous resentment. And it is a horrible absurdity to say that any such misrepsentation is useful or praiseworthy. All rules which are cast in the forms of fiction may easily be put in terms of truth with gain in the way of clearness and of self-respect. Thus in the example which Professor Gray gives is it necessary to assert that registration of an instrument is notice to the world which a party is estopped to deny? Why not say that registration shall have the same effect as notice, and thus tell the truth?

It would be interesting to trace the reasons for legal fictions back to the days of the writ of trespass on the case or even to the twelve tables, and show how they are founded on an admirable instinct, to wit, the desire of the judges to do justice in spite of the bonds of unalterable law. But law is no longer unalterable and fictions no longer desirable in any sense. They corrupt the fountain of justice, and bring about the layman's

[1] Nature and Sources of Law, § 89.

distrust of the courts and his consequent contempt and indifference to the injunctions of veracity therein.

This idea is well expressed by G. K. Cheeterton in the volume entitled, "All Things Considered" (The Vote and the House, page 43). "All injustice begins in the mind. And anomalies accustom the mind to the idea of unreason and untruth. Suppose I had by some prehistoric law the power of forcing every man in Battersea to nod his head three times before he got out of bed. The practical politicians might say that this power was a harmless anomaly; that it was not a grievance. It could do my subjects no harm; it could do me no good. The people of Battersea, they would say, might safely submit to it, for all that. If I had nodded their heads for them for fifty years I could cut off their heads for them at the end of it with immeasurably greater ease. For there would have permanently sunk into every man's mind the notion that it was a natural thing for me to have a fantastic and irrational power. They would have grown accustomed to insanity. For, in order that men should resist injustice, something more is necessary than that they should think injustice unpleasant. They must think injustice absurd; above all, they must think it startling. They must retain the violence of a virgin astonishment."

In the new system, therefore, lies will be taboo, and where made deliberately and in writing will work a forfeiture at once and in the case concerned, not in some future and uncertain and disconnected criminal proceeding. Perjury in oral evidence cannot be so summarily dealt with, because the heat of cross-examination, the bitterness of anger, and the exaggeration caused by resentment of contradiction, have to be taken into consideration.

In the secret written pleadings, however, there are no such influences, and no fear that by revealing too much an unscrupulous adversary may be put upon his guard.

This closes the rudimentary outline. It does not even pretend to cover the essential elements of a trial, for there are important provisions as to the financial assistance of impecunious litigants (German and other courts remit entry fees and certain costs where the party needs all his income for the support of his family), as to the weight of precedent (an unorganized subject in common and European law), as to the appointment or election of judges (Italy has a curious mixed tribunal in certain cases, the three judges being appointed by two different authorities; France has a Tribunal of Commerce, elected by traders only), as to the combination of criminal and tort remedies in one trial (optional with the judge in France), as to the use of masters to clear the dockets (an English practice), as to remedies (with a consideration of how our historically grown law cannot step outside of the stretched limits of certain primitive terms of relief), as to appeals (a curious survival in some respects). All of these and dozens of other topics are as full of interest, and as encumbered with archaic conceptions as what has been considered, but there is room here only for the barest mention and the briefest comment on the steps of a sequence of part of the trial procedure.

We are waking up. Legislatures are floundering about and passing laws in terrifying numbers, but before very long the principles which they have been groping about for will be made clear, and a simple scientific, honest, and unselfish jurisprudence will take the place of the system which is fast assuming a picturesqueness indicating obsolescence.

William M. Blatt

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Practical Business Systems Adapted for Use in Law Offices

COMPILED BY J. HOWARD PATTERSON, LL. B.

of the Williamsport (Pa.) Bar

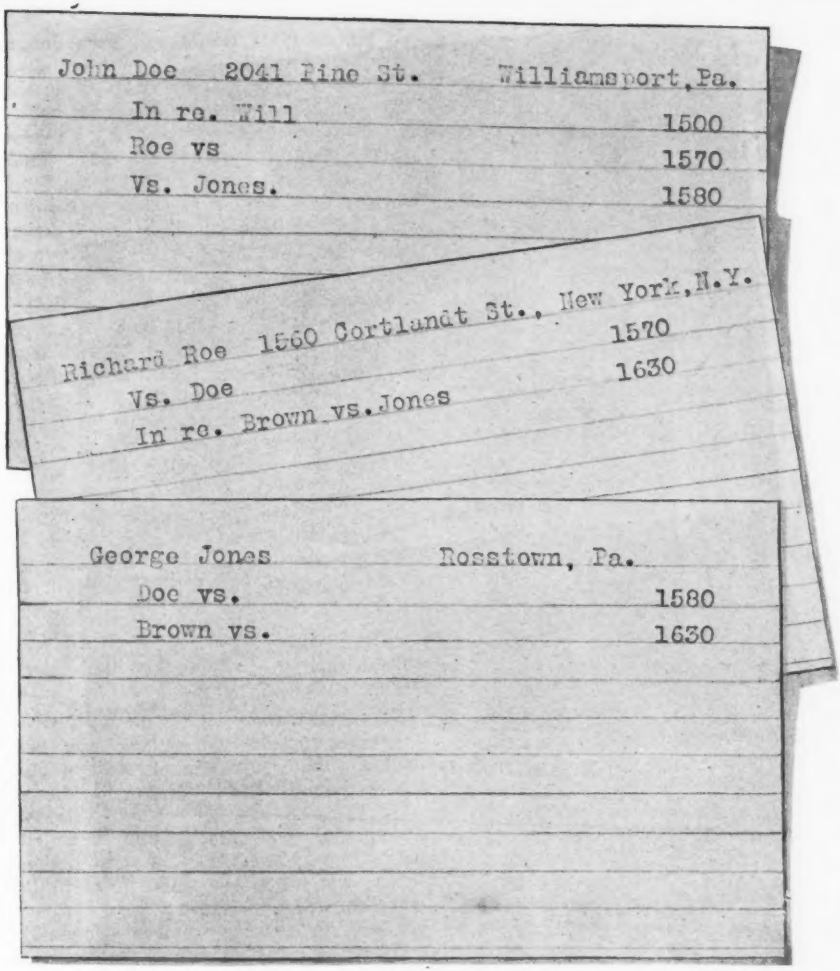
[Ed. Note—This is the second of Mr. Patterson's practical and valuable series of articles on this subject.]

Filing Letters and Papers.

ALL letters received, copies of those sent out, and the papers relating to them, should be preserved in such a manner and place as to be available when needed. The simplest way of making copies is to use carbon paper. This is particularly true in filling out printed forms of deeds, etc. Carbon copies are not permanent, sometimes they become rubbed and blurred, and corrections or signatures made on the original do not show on the copy. Roller copying machines have been adopted in many offices to overcome these objections. These make the copy on a roll of tissue paper, which is later cut apart and filed in the same manner as carbon copies.

The old method of filing was to keep the letters received in alphabetical order, and to copy in tissue paper books, by means of a letter press, the letters and papers written. This resulted in having the letters and copies referring to any one particular item of business scattered through a number of different files and letter books. It was hard to get together the complete correspondence on a subject. Often a letter could not be found at all, because the name of the person it was from was forgotten. In modern offices this plan of filing has been discontinued entirely. All papers and letters relating to one item of business are filed together. When these are all kept in one folder they can be referred to easily and quickly. The manila folders used for this purpose have projecting tabs on which to write the file numbers and the names of the parties or subjects to which the papers in them refer. When a docket sheet is made out, it is given a file number. The same number is written on the tab of the folder, together with the subject of the matter. For instance: "No. 1580—Doe vs. Jones," or "No. 1500—John Doe—in re Will," or whatever the case may be. These folders are kept in numerical order in a vertical filing case, a cabinet of drawers of sufficient size to hold the folders standing on edge or vertically, with the tabs projecting upward. Each letter, no matter who it is from, received regarding the item of business shown on the tab of the folder, and a copy of each letter sent out, or paper drawn, on the same subject, shoull be placed in this folder which is kept in the vertical filing case in its regular numerical position, where it may be reached quickly when needed. If letters and papers are put in the folder loosely, without being fastened together in some way, one of them may slip out of its place and become lost. An ordinary fastener through the back of the folder and through each paper, either at the center of the top or at one corner, will prevent this and also permit keeping letters in chronologi-

Roller Copying Machine

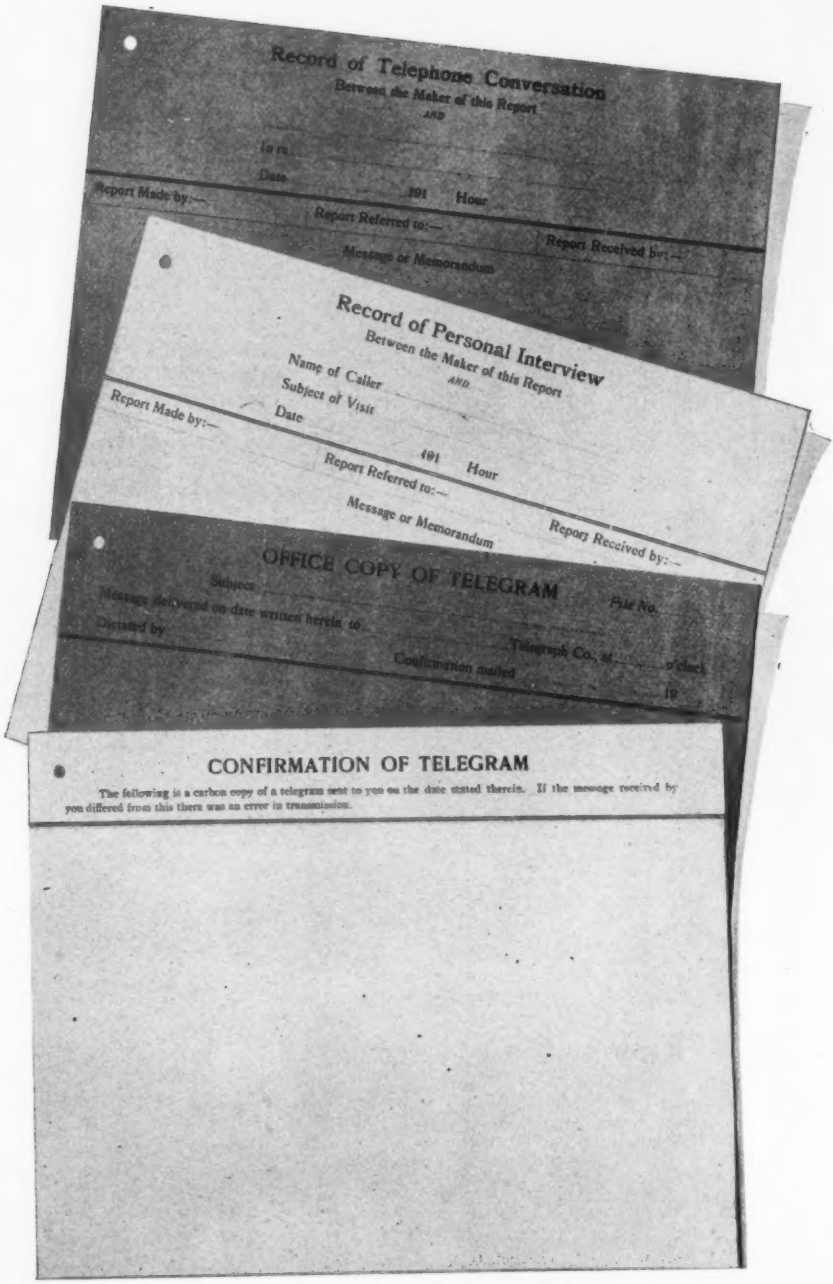


Card System for Indexing Records. (Size 3"x5").

cal order, the copy of the letter written immediately following the letter answered. If there are enough letters and papers in any one case to make the folder too bulky for convenience, other folders with the same file number, followed by the designating letters "B," "C," etc., can be used.

These files take up too much room to go in a safe. Unless a storage vault is used, valuable papers should be placed in envelops to be kept in a safe in numerical order. On one end of each envelop will be written the same file number and subject as appears on the folder relating to this matter in the regular files.

Some subjects will be of such a character as to hardly justify having a special folder made for each of them. A number of these matters may be grouped and a folder made for the group. A separate folder is suggested for each of the following groups: "Miscellaneous Office Business," "Personal," "Library," "Miscellaneous," "Stationery," and such other groups as may be suitable for the indi-



Record Blanks for Conversations and Messages. (Size 6"x8½").

vidual office. A docket sheet should be made to cover each of these groups. If this is not done, the number on a group folder must be skipped in making the next sheet, or in subsequent matters the number on the folder will differ from the number on the docket sheet referring to the same matter, and cause great confusion. It is better to make a sheet each time, as a missing page causes the docket to at least appear incomplete.

Full and detailed information concerning any item of business which may have been handled in the office, regardless of whether it has been active within the past few days or has not been considered for many years, can always be gotten quickly from the docket sheet referring to a subject, and the folder of the same number. These two sources comprise the entire record, unless there are valuable papers to be found in an envelop of the same number in the safe. The advantages of having these records accurate and comprehensive are so obvious as to require no discussion.

Indexing Records.

Records on docket sheets or in files will be of little value without a systematic method of indexing. It must be possible to reach them quickly when needed.

One method of filing is a combination numerical and alphabetical system which requires no index. It is not very satisfactory in a law office except for the miscellaneous correspondence, because the lawyer must be able to reach information when he remembers only the name of the plaintiff, or of the defendant, or of an interested party. It is extremely difficult, if not altogether impossible, to do this when any alphabetical system of filing is used. In general use there are two methods of indexing according to numbers.

With the "loose leaf system" one or more binders and a number of record ruled sheets of paper, measuring about 3 inches by 5 inches, are used. On the top line of the sheet is written the name and address of the person, or subject, to be indexed. On the following lines the matters in which this person is interested, together with the file numbers referring to such matters, appear.

John Doe's card shows him to be concerned in three matters in the office. Information regarding his will is to be found on docket sheet and in folder number 1500. Docket sheet and folder number 1570 gives the information concerning the case of Roe against him. Any valuable papers in this case would be found in an envelop in the safe, marked "No. 1570 Roe vs. Doe." The details of his case against Jones will be in folder and on docket sheet number 1580.

A separate sheet is made for each person with whom there is any correspondence and for each person who has any business relations with the office. These sheets are kept in alphabetical order in a loose leaf binder. They can be referred to more readily and quickly if alphabetical guide sheets are inserted at proper intervals.

The "card system" of indexing is practically the same as the other. Except that, instead of being written on thin sheets of paper for inserting in binders, the index is made on thin pasteboard cards for filing in a "card index case," consisting of a cabinet of one or more drawers of proper size to hold the cards standing on edge in alphabetical order. For quicker reference, as in the "loose leaf system," alphabetical guide cards are placed between the index cards at proper intervals.

Placing the address after the name on the index sheet or card makes of it a very complete office directory. This will be valuable not only for finding the proper addresses when writing letters, but for many other purposes which arise from time to time.

Recording Conversations and Messages.

It is often advantageous to have a record in the office files of various conversations and messages. Blanks for noting conversations (whether personal interviews or carried on over the phone) should have places in which to write the names of both speakers, the date and exact hour of the talk, and a brief description of the interview. This makes a complete record for the files. Tele-

phone conversation blanks should be of a different color from those used for recording personal interviews in order to make them distinguishable quickly. Having a space on them in which to write the initials of the person to whom the record is referred makes them useful for informing him concerning a call or message which came in during his absence from the office. Receipting for the message shows it to have been received, and fixes the responsibility in case of any misunderstanding. If a caller comes into the office to see someone who is out, or when a telephone call is received under the same circumstances, the clerk should have one of these blanks conveniently at hand, fill it out, and place it on the desk of the person for whom it is intended before the matter is forgotten. If it is not desired to retain a record of the message, it is destroyed after being read. Otherwise it is receipted for, and placed where it will go into the files with the correspondence on the subject to which it refers. A note of important matters made on such a blank during an interview, and placed in the files, is much more to be depended upon at a later date than the memory of what was thought to have been said.

Copies of telegrams which have been sent from the office should be easy to recognize among the other papers in the files. A special blank on which to make a copy when the message is written is practical. These should show the subject of the matter, the file number, which telegraph company handled it, and the hour at which it was sent out. It should also show what particular person in the office sent it and when it was confirmed. There are so many mistakes made in sending telegrams that it has become customary in all business houses to confirm each message; that is, to mail a copy of it to the person to whom it is addressed. Having the blank for the confirmation and the blank for the office copy made of the proper size permits them to be placed in the typewriter with the original message and all written in one operation, by means of carbon paper. This insures exact copies. The stenographer fills in the additional blanks on the office copy for filing, and puts the confirmation in an envelop for mailing. A detailed record is preserved of all telegrams sent out, and mistakes made by the telegraph company in transmission are soon rectified.

(To be continued)

Memorandum of Conversations.

Do not leave the details of any important business conference to depend for their preservation on your memory alone. To guard against it secure, whenever it is practicable to do so, the presence of some disinterested and trustworthy person as a witness to what may be said or done. In addition to this make at the earliest moment practicable a careful memorandum of the things said or agreed upon with the date, place and persons present, by which you may refresh your memory and fortify your statements when the necessity arises. It will keep you from mistakes, give you the satisfaction of feeling quite sure that you are right, and it will ordinarily relieve you from any controversy over the accuracy of your statements.—Judge Henry W. Williams.

The VanZandt Will

By Faxon F. D. Albery

of the Columbus (Ohio) Bar

[Ed. Note.—The February Law Story in which equity intervenes in a chivalrous way to aid a blue-eyed maiden and to settle a perplexing problem.]

OLD man VanZandt had made up his mind clearly and definitely that his estate should never be involved by any such foolish complications as those which had resulted in his friend Clippenger's estate being tied up in the courts indefinitely. The trouble with Clippenger's will was that that worthy had given a large share of his property to "the children" of his son Amos, and, as Amos was a comparatively young man, in vigorous health, and was entertaining his second wife, by whom he had had one child, which died in infancy, and there still remained a daughter by the first wife, it had resulted in a trusteeship of all that part of his estate, which had thus to lie dormant until Amos should depart this life. Because as long as he lived and took unto himself wives, there was no way of determining who and how many his children were.

Now, notwithstanding old VanZandt knew this complication grew out of the fact that Clippenger had written his own will, having the layman's conviction that any man of ordinary intelligence could make a perfectly good will and that it needed no lawyer when one had so good and reliable a book as "Every Man His Own Lawyer" at hand, and, notwithstanding the further fact that old VanZandt knew that his friend Clippenger, in his commendable effort to save a lawyer's fee for drawing his will, had put his estate to an expense ten times as great in establishing and maintaining the trusteeship, he, the said VanZandt, deliberately sat down, took his pen in hand and proceeded, with the aid of the aforesaid valuable "Every Man His Own Lawyer," to write his own will, and, at the same time, avoid the complications which had beset the effort of his friend Clippenger.

Having accomplished this to his entire satisfaction, and having bolstered it up with divers and sundry curbstone opinions wrung from lawyer friends, who failed utterly to recognize the fact that he was "beating" his way, because he adroitly covered up his design by beginning with a dry cough and, "Now supposin'," or, "I seen in the paper," or "Bill Finley said a funny thing," I say, having thus accomplished and bolstered, old VanZandt one fine day was gathered to his fathers after the fashion of all mankind.

And now his Honor, the chancellor, was worrying over the VanZandt will. For it had become necessary, notwithstanding the infallible aid offered by the business man's friend, the book aforementioned, and the manner in which the same could be worked by an intelligent mind, to go to court for the purpose of determining what old VanZandt meant when he said:

"Item 6th. I give, devise, and bequeath to the children of my daughter Mary who may be born before the year 1911, one full third share of my estate, real, personal, and mixed, that may remain after paying the debts and legacies aforementioned."

The old man knew, therefore, that there would be no indefinite trusteeship, and he was satisfied at the same time that he had made a will that was as good as any lawyer could make, and moreover that he had saved at least $100 in lawyers' fees, for his estate was large and that would be a comparatively low fee for drawing his will.

Old VanZandt, therefore, died in peace, knowing that he had got ahead of the lawyers, and had fixed things so that his estate would not be tied up indefinitely in the courts, as was his friend Clippenger's.

It happened, also, that Mary VanZandt Brown, his daughter, became the mother of a vigorous boy, who deferred his arrival till 40 minutes past 11 on the night of December 31, 1910, and half an hour later by the same clock, this boy was joined by a beautiful, blue-eyed maiden. In short Mary VanZandt Brown was become the mother of twins, one of which was born in the year of our Lord 1910, and the other in the year of Grace 1911, and it was this fact which had brought his Honor, Judge Burgoyne, to the point, where he now found himself, of knitting his brows and gazing at the northeast corner of the ceiling, in his effort to interpret the meaning of the VanZandt will, and to make such a decision as would carry out the testator's manifest intent.

To begin with, it seemed quite clear to his Honor that old VanZandt had a perfect legal right to make such a will,—no matter how cranky it sounded. Because it violated none of the laws of reason or probability, and fixed a rule for distributing his estate which, except in the most improbable and extreme class of circumstances, could be easily determined and applied. If he chose to cut out children born after a fixed period that was his affair, as he was not dealing with his own offspring.

It was clearly established that he was of sound and disposing mind and memory, and not under any restraint. In fact old VanZandt was noted in his lifetime for hard sense, clear headedness, and determined character, and it was generally conceded that these qualities had aided materially in building up his huge fortune. So that nothing appeared to disturb the bosom of the chancellor but the question as to the status of the twins.

Primarily the question occurred to him as to whether even the boy could take under the will, as the time of arrival had been what is known as "standard time,"—an arbitrary and new-fangled contrivance gotten up and foisted upon the community by the railroads of the country, and which many people refused yet to recognize as the measure of their passage through this vale of tears. It was not God's time according to the conservatives; God's time being determined (this they did not know) by old man Savage, the town jeweler and clock mender, who went out on the roof of his store and took what he was pleased to call "a obserwation." This mysterious rite consisted in sighting through a surveyor's level at the flag pole on McDonald's livery stable. But it was noted that the old man never failed to take particular notice of the "shadder" made by the tall "chimbley" on the tin roof, and Cabbage Sanders did say that he once "ketched him a 'peekin' through the wrong end o' the durned thing." So that even God's time was often a debatable proposition and open to criticism. If the time referred to in all the law books and decisions which had found utterance under the common law were to govern, the boy himself had arrived eighteen minutes too late to inherit, and of course the little girl was hopelessly in the rear for the additional ten minutes she had taken on the way made it impossible for her to be even a standard time arrival of 1910.

No wonder the chancellor's brow was corrugated and his half-closed eyes seemed to be boring a hole in that N. E. corner of the ceiling. Only once in a lifetime is a judge called upon to settle such a question,—sometimes not that often, for there are many judges who escape the real problems.

But his Honor, Judge Burgoyne, was a fearless lawyer, who took the knotty questions along with the easy ones as part of his judicial task, and he now reasoned:

So far as the general proposition of time is concerned, even the philosophers

never got very far in defining it, and when a great man like Leibnitz can make it no clearer than this, "Time is the confused apprehension of a system of relations," this court will not consider that it is laying violent hands on old Father Time by making his own definitions. While it is true our decisions and ancient law books knew no such thing as standard time, yet time in the abstract is only a measure of existence, and even under the old *régime* we had at least two methods of measuring time, so that at best any measure is arbitrary, and it is a fair proposition to say that when a legal document refers to time in a general way, the measure of time which prevails in the locality is meant—that time which the community observes in which a man lives.

There was little difficulty, therefore, in passing that point, for, with the exception of an odd one here and there, no one of all VanZandt's friends, acquaintances, neighbors, or customers had known anything but standard time for many years, and all his comings and goings had been regulated thereby, so there could be no question about that, and the will must be interpreted accordingly.

That point settled, the right of the boy to inherit was fixed, because he thus came within the direct terms of the will.

But the little blue-eyed maiden! It looked bad for her unless some principle of Equity could be invoked that would let her in. So the judge considered. He took up everything. Many far-fetched and impossible ideas, just for the purpose of testing them—just as a man will when he is reaching out to find something to fasten his heart to.

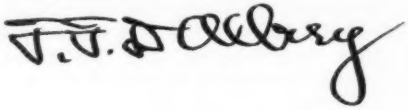
(I don't mind mentioning the fact right here that this was exactly what Chancellor Burgoyne was trying his best to do, for, at the hearing, the twins had been brought to court and he had fallen desperately in love with Exhibit 'B'—the aforesaid blue-eyed maiden, who had grabbed his finger, smiled exquisitely upon him and ducked her head in that coquettish manner only possible with girl babies, when he was introduced to her, and, being passionately fond of babies, of whom he had none, the case was then and there settled in favor of the maiden, who had thus overcome all the arguments of learned counsel, and now the court only sought for plausible reasons for its judgment.) Could it possibly be settled on the principles of partnership? The infants were incapable of making a valid contract as to which should take precedence in entering the world. Besides, they might not have been able to carry it out even if they were. It could scarcely be a partnership *ex contractu*, but it might be one *ex delicto*. But that was a remote and scarcely tenable theory, and really unnecessary to a solution of the problem.

Other ideas were dismissed with the same definiteness, and he always came back to the main proposition that these two were twins. It seemed quite clear to his Honor that they were of the same actual age, and the point of difference as to their entry upon the scene of life so infinitesimal that it ought to make no difference as to their property rights. It was the merest accident that the boy had preceded the girl in the march of life, and they were in fact one.

What the testator evidently had in mind in drawing that sixth item of his will was, all created human beings of the blood of the ancestor (his daughter Mary) who were in existence prior to 1911. His object was not to create a class who should inherit, so much as to cut off those from inheriting who should come straggling along years after his death to complicate and delay the administration of his estate, and, inasmuch as no such result could follow from letting in the blue-eyed maiden to inherit, the ordinary rules of equity and justice demanded that she be not cut off because, being a lady, she had taken advantage of the lady's privilege of being somewhat late, owing possibly to toilet or other necessary arrangements common to the sex. The judge's experience was that women were always late anyhow. He had frequently said of his own spouse that she was always clinging to the end of the gang plank when it was hauled in as the boat was pulling away from the dock. Much, therefore, had to be conceded to them on account of their sex.

There was also an old axiom of the law that the court would consider as done what ought to have been done, and in this case unquestionably the lady ought to have proceeded more expeditiously. That she had not done so might also be considered possibly as the fault of another. She herself, no doubt, was ready and anxious to move on, and if the rules of society had been observed, the gentleman would have allowed the lady to precede him.

There were other law principles which might be invoked did the court consider it necessary to do so, but for the present, these seemed to be sufficient reasons for holding that brother and sister should take at least one share in common under the will. But the court, inclining to the larger view, a decree might be entered giving to each a full share of the estate in accordance with item sixth of the will, with the privilege to any interested party desiring to do so to take an appeal from this decree.



Involving the Girl

The law's far-reaching hold upon the property of the bankrupt is illustrated in a recent court decision that compelled the fiancée of a man who had gone into bankruptcy to return for the benefit of the creditors the engagement ring that she had accepted some four months previous to the business failure. No evidence was introduced to suggest that bankruptcy was anticipated at the time of the proffer of the ring or that there was any scheme to defraud anybody. But when the donor went into voluntary bankruptcy, and the counsel for the creditors looked about for assets, the three hundred and fifty dollar engagement ring was listed as available for their benefit. The ring, however, was not relinquished without the intervention of a court mandate, secured through suit brought by the trustee in bankruptcy.

There was nothing unusual about the price and quality of the ring, considering the social position of the parties and the supposed financial condition of the man; but the question turned upon whether the bankrupt had a right to give away, so short a time before his insolvency, money or money's worth that practically belonged to his creditors. The law was found to deny the privilege. In the finding of the Federal court may be said to be established the legal status of the engagement ring. The lady does not get it in exchange for her promise to marry. Her word is no tangible consideration wherewith she pays for the sign of her betrothal. Her word is in exchange for the lover's and the gift of the ring is voluntary on his part. That leaves the romance of the affair unimpeached, in the fair and square case; but it is tough on the girl acting in good faith, where it turns out that her engagement ring had been bought with money that her lover justly owed to others. It might have been the decent thing to leave the lady the undisputed possession of the ring, but the law and the courts are no respecter of sentiment, any more than clamoring creditors are likely to be. It is the old story of the just suffering with the unjust, but the moral for girls is plain; dont' fight for the retention of an engagement ring that turns out not a fair deal.—New Bedford Standard.

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Effect of Discharge in Bankruptcy Upon an Assignment of Future Wages

BY ALMOND G. SHEPARD

WHEN collateral to a debt of the assignor, an assignment of wages to be earned in the future where the term of service is at will is generally regarded as enforceable after the service has been performed, to the extent of the performance, although of course it is conceded that equity will not attempt the specific performance of such a contract by undertaking to require the assignor to perform the service in order to carry out the terms of assignment. And it is clear that it is only where labor has been voluntarily performed that the question now presented can arise. At most an assignment of this character vests the assignee with a very unsubstantial and precarious right, since it depends upon the future employment of the assignor by a third person who is under no legal obligation to furnish such employment, and the continued performance of the service by the assignor who is under no legal obligation to perform, or any obligation to perform which equity will enforce.

The question, therefore, arises as to whether or not the shadowy right vested in the assignee by such an assignment constitutes a lien within the terms and meaning of the bankruptcy law, which provides that a discharge in bankruptcy shall not affect valid liens created by the bankrupt prior to his bankruptcy.

Some courts of very high standing have sustained the validity of assignments of this character, and held that a lien is thereby created which would be enforced in equity, although subsequently to the assignment the assignor had been adjudicated a bankrupt and had been duly discharged in such bankruptcy proceeding.

This is the doctrine of the Massachusetts court,[1] holding that a discharge in bankruptcy is not a bar to nor does it invalidate an assignment of wages to be earned in the future under a contract terminable at will. The court reasons that a worker under a contract for service, though indefinite as to time and compensation and terminable at will, has an actual and real interest in wages to be earned in the future by virtue of his contract, and his interest in his wages and his right to assign same is compared with the owner's interest in and right to sell wool to be grown upon sheep, or a crop to be produced upon his own land, and it is said that wages to be earned by virtue of an existing employment are no more shadowy or insubstantial than the fleece of next spring or the crop of the following autumn. Money to accrue from such service is not a bare expectancy, or a mere possibility, but a substance capable of grasp and delivery. It constitutes a present, existing, right of property, which may be sold or assigned as any other property. Although not in the manual possession of the assignor, it is in his potential possession. The transfer of this potential possession creates the assignee a lienor upon the property right.

The Illinois supreme court has also reached the same conclusion.[2] The doctrine is here asserted that a discharge of a debtor in bankruptcy is but a personal release, and does not exonerate the effects of the debtor to which a valid lien has attached, and which is not expressly annulled by the provision of the bankruptcy act. The court apparently treated the equitable right vested in the assignee of wages of this character as a

[1] Citizens' Loan Asso. v. Boston & M. R. Co. 196 Mass. 528, 124 Am. St. Rep. 584, 82 N. E. 696, 13 Ann. Cas. 365, 14 L.R.A.(N.S.) 1025.

[2] Mallin v. Wenham, 209 Ill. 252, 101 Am. St. Rep. 233, 70 N. E. 564, 65 L.R.A. 602.

valid lien which has attached to the effects of the debtor.

Both of these cases cited and rely in part upon Edwards v. Peterson.[3] This case, however, did not arise under the bankruptcy law, and does not go to the extent of the Massachusetts and Illinois cases. It is authority, however, for sustaining the validity of such an assignment as between the assignor and the assignee, but it is not authority for the doctrine that such an assignment creates a lien upon the property.

In the Massachusetts case referred to, the applicability of the comparison of the right of the individual in his labor under a contract terminable at will with the right of the owner of sheep to sell or pledge the fleece of the coming season, or the owner of land to sell or pledge a crop to be raised thereon the coming season, is not entirely clear. That case concedes that a person cannot sell or pledge a fleece to be grown upon the sheep of another, or a crop to be produced upon the land of another. An assignment of wages to be earned in the future under a contract terminable at will would seem to fall more within the doctrine applicable to the equitable rights created under an assignment of some contingent right or interest, than the class referred to.

In the latter class of cases, however, enforcement is not had in equity on the theory that a lien has been created by the instrument under which the right is asserted. But effect is given the assignment upon the ground that a mere expectancy, or a contingent interest, may be assigned and the assignment enforced in equity, although the subject-matter of the assignment has no actual or potential existence, but rests in a mere possibility only.[4] These assignments are not enforced on the theory of a lien, but rather on the theory that though a man conveys *in præsenti* that which does not exist, yet, it being in form a conveyance, it operates in equity by way of contract, merely to take effect and attach to the things assigned as soon as they come *in esse*.[5]

Under the doctrine applicable to assignments of the latter character, it would seem clear that if an assignment of wages to be earned in the future, under a contract terminable at will, falls within this class of assignments, the assignment does not operate to create a lien which is protected against a discharge in bankruptcy by the express provision of the bankruptcy law that a discharge in bankruptcy shall not affect liens given or accepted in good faith, etc. And this is the view taken by the majority of the cases which have considered the question. Thus it has been held "that, although such an assignment may be valid and enforceable in equity as to wages subsequently earned, yet it creates no present lien which is protected by a discharge in bankruptcy."[6]

In the West Case, the court says that the theory of a lien upon the earnings of future labor is not that it attaches to soch earnings from the moment of the contract of pledge or assignment, but from the moment of their existence. There can be no lien upon what does not exist, and the law does not continue an obligation in order that there may be a lien, but only does so because there is one. Hence the effect of a discharge in bankruptcy upon a prospective lien is the same as though the debt secured by the lien had been paid before the wages were earned. And in the Minnesota case referred to, it is held that the assignee at the time of the adjudication and discharge in bankruptcy of the assignor had no lien on or vested right in the latter's wages thereafter to be earned. That at most the assignee had a mere expectancy depending on contingencies, and that such a right did not come within the terms and meaning of the saving clause of the bankruptcy act relating to liens. And in the Kentucky case an order in effect an assignment of wages to be earned in the

[3] 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936.

[4] Langton v. Horton, 1 Hare, 549; Whitworth v. Gaugain, 3 Hare, 416; Robinson v. MacDonnell, 5 Maule & S. 228; Apperson v. Moore, 30 Ark. 56, 21 Am. Rep. 170; Bacon v. Bonham, 33 N. J. Eq. 616; Williamson v. Colcord, 1 Haskell, 620; Fed. Cas. No. 17,752; Field v. New York, 6N. Y. 179; 57 Am. Dec. 435.

[5] Emerson v. European & N. A. R. Co. 67 Me. 392, 24 Am. Rep. 39; O'Neil v. William B. H. Kerr Co. (O'Neil v. Helmke) 124 Wis. 234, 102 N. W. 573, 70 L.R.A. 338.

[6] Re West, 128 Fed. 205.

future was conceded by the court to secure the holder an equity which attached as soon as the wages were earned, but it is held that the right did not attach until the wages were earned, and hence the order was valid only so long as the indebtedness secured thereby remained unsatisfied. It was of no higher or greater dignity than the debt itself, and therefore was barred by the discharge in bankruptcy of the assignor.

The enforceability of an assignment collateral to a debt necessarily depends upon the existence and validity of the debt. An apparent exception to this rule is where an assignment is collateral to a debt which is barred by the statute of limitations. In such a case it is true that the assignment is generally enforceable, although all action on the debt is barred by the statute of limitations. Here, however, effect is given to the assignment because the debt is not released by the statute of limitations. It still exists, but action thereon is barred if the statute is pleaded as a bar. This is not the rule, however, as to discharges in bankruptcy, for by the discharge the debt is extinguished. A status is thereby created which is very similar to that arising where a surety has assigned an interest in property as collateral to the debt of his principal. In such case it is settled law that the discharge of the surety as by extending time to the principal, also releases the assignment.

It would also seem to be clear that Congress was of the opinion that liens which were collateral to debts of the bankrupt would be released by his discharge in bankruptcy, else they would not have had recourse to the saving clause of the statute by which liens were not to be affected by the discharge. It would seem, therefore, that an assignment of wages of the character referred to can be given effect after the discharge of the assignor in bankruptcy only upon the theory that a lien was thereby created. Upon this point, as already observed, able authority may be found both pro and con.

While not involving the question of assignment of wages, an interesting case as to the effect of a discharge in bankruptcy upon an assignment of an interest in expectancy only, where the assignment was collateral to the debt of the assignor, is Bridge v. Kedon,[8] holding that an assignment by an heir of his expectant interest in the estate of his living ancestor is not affected by a discharge in bankruptcy, although the debt to which such assignment was collateral is released thereby.

[7] Re Home Discount Co. 147 Fed. 538; Re Ludeke, 171 Fed. 292; Re Karns, 16 Am. Bankr. Rep. 841; Leitch v. Northern P. R. Co. 95 Minn. 35, 103 N .W. 704, 5 Ann. Cas. 63; Levi v. Loevenhart, 138 Ky. 133, 137 Am. St. Rep. 377, 127 S .W. 748, 30 L.R.A.(N.S.) 375.

[8] 163 Cal. 493, 126 Pac. 149, 43 L.R.A.(N.S.) 404.

Evading the Law

BY LEE E. JOSLYN

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THE extent to which the legal profession has become "commercialized," the trend of leading members of the profession to become merely paid employees of the "Napoleons of Finance" and of great business and commercial enterprises, has become a matter deserving and receiving much attention during the past few years.

This "commercialism" has been the cause of much well-founded criticism, and it cannot be intelligently denied that the high aim, the true and noble ideals, as well as the ancient pride of the true advocate, have materially retrograded from the standards of the past. That this is fully recognized and deeply deplored by the profession as a whole, and that efforts are making to return, as far as may be, to the old standard, is most strongly emphasized by the "canons of ethics," adopted by the American Bar Association and by many similar minor organizations.

The march forward toward commercialism, the falling of the standard of the average lawyer and practitioner, and the tendency toward a sale of the brain and training of the modern lawyer, must be, and is, followed by its necessary and natural corollary,—systematic efforts to evade the law as it may, from time to time, be enacted by the legislative authority, or as interpreted by judicial decisions.

The evasion of the law is not, by any manner of means, confined to the "giants" of the profession, in their efforts that have proved so successful in the organization of the trusts, big business corporations, and combinations of capital; it is likewise extended to minor transactions, involving immunity from local ordinances, state statutes, regulations of various official boards and commissions, and the effects given to various transactions by the judgments and decrees of courts of both original and appellate jurisdiction.

Only the minor and seemingly unimportant attempts to evade the law, those practised for the benefit of the clients of the ordinary practitioner, are here considered. The illustrations suggested have come within the personal knowledge and experience of the writer, and are not theoretical.

Watered and Promotion Stock.

The laws of some of the states permit of the issuing of almost any amount of corporate stock, in exchange for property, tangible or intangible, without sufficient, if any, supervision as to the value of the property; the limitation in many cases consisting only of the "conscience" of the original promoters. Many states have provided, however, that where property is turned in as payment for stock, the property must be itemized, and its actual value shown by affidavit of the first board of directors or by a majority of the original organizers; in these states each person receiving or buying stock from the corporation must pay the par value thereof, and is liable at all times for any part of the par value for which he has not in fact paid. There are, perhaps, more attempts to evade this law than any other excepting the laws governing the assessment of property for taxes.

The following are illustrations, the names and class of business being changed:

The Plow Works Company was organized with a capital stock of $300,000, of which $250,000 was common, and $50,000 preferred. This corporation was organized by a lawyer of large experience, thoroughly versed in the corporation laws of the state. Mr. Jones,

claiming to have a valuable invention covering improvements in plows, induced A, B, and C to furnish funds to obtain a patent, prepare specifications, patterns, and designs, and to make one complete plow; the total expenditure was somewhat less than $1,000. Then the corporate articles were prepared, A, B, and C each subscribing for one share of stock and paying therefor the par value of $10; Jones, entirely irresponsible financially, subscribed, as trustee, for the entire balance of the capital stock, agreeing to pay, and paying therefor, by turning over to the corporation the patent, specifications, designs, and one complete plow. Then at the same time Jones assigned to each of the other three a one-fourth part of his capital stock; his stock was surrendered and new stock issued, so that each of the four had $62,500 of the capital stock of the corporation, "fully paid and nonassessable." With a "report" to the secretary of state that the corporation had a capital stock of $250,000, all paid in, it had no considerable trouble in obtaining large lines of credit, and was able to sell a large part of its preferred stock for cash. Some of the common stock was also sold, the proceeds of these sales going, not into the corporate treasury, but into the pockets of the four promoters. From these sales many times the original investment was returned to the original "promoters." At the same time they retained over $200,000 of the common stock, and with it a control of all corporate transactions. All were voted large salaries, making certain the extraction of all cream not previously separated. With such a road, such a vehicle, and such handling of the reins, there could be but the one destination,—insolvency and bankruptcy.

With the lights of this ultimate destination in the near distance, and with the effects of publicity of the transactions, the eminent counsel was called in for consultation. The only possible escape, if any, was pointed out; each of the stockholders must surrender all stock for which they had not fully paid the par value; the stock was surrendered, but there was no sale for it. Bankruptcy followed, and creditors to the extent of hundreds of thousands of dollars received dividends amounting to 11.2 per cent. The trustee is now making an effort to compel A, B, and C to pay for the stock received by them; they are defending under the claim that they bought (?) their stock from Jones, and also that they surrendered it to the corporation.

In another case a defunct partnership left as its only asset an old machine for manufacturing a patented spring bed. This machine was placed in storage, where it remained for some five years, the storage amounting to $250. A promoter purchased the machine, agreeing to pay the storage thereon and $350, a total of $600. The promoter at once organized a corporation with a capital stock of $20,000, $10,000 of which was at once turned over to the promoter in payment for the machine and the patent connected therewith; of this stock $4,000 was turned over to two other parties, $2,000 to each. Some of the remaining capital stock was sold and used in the business to pay the "salaries" as long as the money held out. Mr. Promoter sold $3,000 of his stock to Mr. Sucker for $3,000 cash, upon condition that Mr. Sucker would be elected secretary of the corporation at a salary of $2,400 per annum. The corporation was "in business" for a little less than two years, at the end of which time it had debts of upwards of $8,000, in addition to $5,300 due for salaries. It never made and sold a single bed spring. The original "machine" was on hand, had never been paid for, and the original owner was allowed a preferred claim for the $350. The original stockholders filed claims for salaries aggregating more than $6,000, but all were disallowed excepting those of Mr. Sucker, on the ground that each of the claimants, in equity if not in law, were indebted for unpaid stock. This decision was upheld on appeal, by a United States district judge. Creditors received less than 7 per cent on their claims. Every step in the organization, management, and manipulation of this corporation was taken under the advice of an attorney.

Secret Liens and Preferences.

The laws of most of the states guard against secret liens upon the personal property of men in business, by provisions rendering such liens invalid or void, as to creditors, unless record thereof is had in the proper recording office. A chattel mortgage, or other lien upon the property of a merchant, has a tendency to lessen or destroy his credit. Many and ingenious subterfuges are resorted to, to provide for such liens without complying with the law as to recording. Sales, with reservation of title in the seller until full payment, or "conditional sale agreements," are in vogue in all states where the recording of such contracts is not required. By this method the seller actually sells the goods, the buyer buys and agrees to pay, but a clause is inserted about as follows: "It is agreed that the title to, possession, and ownership, of the property hereby sold, shall be and remain in the seller until the full purchase price has been paid in cash." Other clauses in these contracts usually provide that the buyer shall be liable for loss in transit, for destruction by fire or otherwise, and in every possible contingency; even if the goods are taken back, the buyer must still pay the purchase price. Such contracts are not "required" to be recorded in the state of Michigan, under the law as made by judicial decision. The efforts to which creditors resort to obtain, retain, and enforce a secret lien under this law are, at the same time, amusing and alarming. They involve intrigue, crime, and perjury.

In one case a creditor, in the sum of $600, consulted his attorney, and was advised as to the title retained under a conditional sale contract, of which form of lien this particular creditor had no previous knowledge. What advice he received from his attorney was not disclosed. The debtor had given a chattel mortgage, and a petition in bankruptcy had been filed against him. The creditor called at the store, in the possession of the chattel mortgage trustee, and asked to see the invoices of the goods which he had sold to the bankrupt. They were exhibited to the creditor; after he left they could not be found. Later, on the same day, the creditor called on the bankrupt, stating that he wanted a "receipt" for the goods sold; he obtained the signature of the bankrupt at the bottom of each invoice. Within a few days this creditor filed a petition, through his attorney, alleging that the goods were sold on a contract retaining title, and praying that the bankruptcy receiver be ordered to turn the goods over to him. A hearing was had upon the petition. Being in bankruptcy, with its wide and extensive powers of investigation, the full facts were brought out, including a close scrutiny of the creditor's books. It was not only made to appear that the title retaining clause on the invoices were written, after the bankrupt signed the "receipt" for the goods; but, further, that the creditor's books showed that some of the goods claimed had been paid for, that erasures showing an attempt to make the books show conditional sales had been made, that perjury had clearly been committed. It is needless to add that the goods were not turned over to the creditor.

It is to the credit of the bankruptcy law to suggest that the circuit court of appeals of the sixth circuit, in November, 1911, in a case reported in 27 Am. Bankr. Rep. at page 345, has gone a long way in preventing secret liens under so-called "title retaining sales."

Preferences in Bankruptcy.

Under the bankruptcy law no payment made by a person when insolvent, if within four months of bankruptcy, is valid, "if the payment results in a preference, and if the party receiving the preference knew, or had reason to believe, that such preference was intended." Another provision avoids a mortgage given within the four months' period, unless for a present consideration. Preferences are often obtained, and the law evaded by the giving of a mortgage for a full and complete present consideration; the bankrupt having an agreement that the proceeds of the mortgage are to be at once turned over to some creditor or creditors whom he desires, for some reason, to prefer. In such cases the law is evaded and pref-

erences are permitted, unless it can be shown that the mortgagee knew the purpose for which the mortgage was given. Such proof is usually difficult, if not impossible, to obtain.

The law of set-off is preserved in the bankruptcy law; it has been held that in the event of bankruptcy a bank, having the bankrupt's money on deposit, may apply it on any indebtedness of the bankrupt to such bank. Banks frequently obtain preferences contrary to the intent of the law, by inducing the bankrupt to collect in large sums of money immediately preceding his failure, and making deposit of the same in the bank. Unless the object and purpose to create a preference in such a manner can be clearly made to appear, the transaction may not be disturbed.

Transfer of Liquor Licenses.

Under the laws regulating the sale of intoxicating liquors, a person licensed to do business may not sell, assign, or transfer his license, and on his death it does not pass to his executor or administrator. Yet the law is now, by the aid of counsel, often avoided and evaded. A man, unable to longer continue the business, enters into an agreement with a prospective buyer to the following effect:

A. That the buyer may, for the balance of the year, continue the business under the name of the licensee.

B. That the licensee will make application for a license, the following year, at the same place.

C. That the buyer is also to make application for a license at the same place; if the buyer is granted the license, the seller will drop his proceeding.

D. If the seller gets a license, and the buyer does not, the seller will still continue to permit the buyer to run the business, in the seller's name and under his license; this to continue until the buyer legally obtains the license.

The whole scheme and agreement is void and contrary to the statute, but the method has been worked out by attorneys, and it results in defeating the clear purposes of the law in most cases. In some cases where the number of licenses that may be issued is limited, as much as $7,500 has been offered, and paid, for such a contract and agreement.

Payment of Taxes.

Perhaps in no other line are there so many successful attempts at evasion of the law, as in the assessment and collection of taxes. Many illustrations might be given. Here are a few.

Personal property in Michigan is assessed where the property is located, on the 1st Monday in April. This date is different in other states. As a matter of fact, and to prevent fraud, the same date should exist, or the date should be the same, in every state. Banks are assessed at the market value of their capital stock and the surplus, less any amounts invested in real estate, or in United States government bonds. I know of a bank which, for years, during the latter part of March, of each year, invested all of its available surplus, and a considerable part of its capital stock, in United States bonds, holding the bonds until after the date of taxation or assessment, and making its report accordingly. As soon as the assessment had been made, the bonds were resold to the original owner; it is currently reported that the same bonds served a like purpose in several other states, where the date of assessment permitted of such transfer.

Until 1911 mortgages upon real property, owned by residents of the state, were assessable. To escape this taxation, two methods have been devised:

First, the party advancing the money, instead of taking a mortgage, would obtain from the borrower a deed of the property, and would then execute to the borrower a land contract, agreeing to reconvey the property on payment of the amount provided for in the land contract, which amount would be the amount of the loan. These land contracts were not recorded, and the party advancing the money never reported them to the assessing officer.

Second, the party advancing the money would obtain from some friend or relative, in another state, a power of attorney to assign and discharge mortgages; then a mortgage would be executed to this friend or relative and duly recorded; at the same time the mort-

gagee would execute, to himself, an assignment of the mortgage, and withhold this assignment from the records; when the mortgage was paid, the mortgagee would execute a release or discharge and record it, at the same time destroying the assignment. I knew at one time of a man, a faithful member and leading officer in a large church, who had more than fifty of such mortgages, who never disclosed in his statement of property, subject to taxation, any of these several mortgages.

Vessel property in Michigan is taxed in the township, city, or village where the principal office of the company is located. For years corporations, owning vessel property, have filed articles of incorporation, fixing their office and principal place of business at the house of some farmer, in some old shop or warehouse, in a township where taxation is at a minimum; usually after an agreement with the assessing officers that, if they located in such township, the amount at which the property was to be assessed was to be only nominal. Such agreements as to the amounts at which the property was to be assessed were usually carried out, as the locating in the township was a "favor" as it were, correspondingly reducing the amount of taxes to be paid by the assessing officer's constituents. One corporation, owning property valued at over a quarter of a million of dollars, was for years assessed at only $10,000. The office of the company was in a farmhouse, just outside the limits of the city, in which city all of its actual business was transacted; once each year its stockholders would drive out to this farmhouse office, elect its board of directors, hold its annual meeting, etc. On the corner of the house was a sign reading, "Office of the ——— Transportation Company." That sign, and the annual meeting, were the only evidences of that farmhouse being "the township, city, or village where this company's principal office was located." This farce has now been largely done away with by decisions of our state supreme court to the effect that "principal office" means the place where, in fact, not in fancy or name only, its real business is transacted.

Credits are assessable; the taxpayer is entitled to deduct from the total assessable credits the amount of debts owing. The annual reports of corporation are made to the secretary of state as of December 31st. Tax statements are made in March following; these reports and statements are each under the oath of the same officer. A comparison of the amount of debts of corporation on December 31st, and in the March following, would frequently lead the unsophisticated to the conclusion that all the law permits corporations to do during January and February is to incur debts which must not, and cannot, be paid until tax statements have been made and filed.

A comparison of the usual tax statement as to the assets of a corporation, with a similar statement made to a bank or trust company, from whom a loan is desired, would be like comparing the value of an iceberg in Baffins Bay, with a Consolidated Rubber Plantation in Mexico,—"according to its prospectus."

The annual fatal attacks, necessitating removals from the state, coming each year just prior to the time for assessment; the unheard of and unbelievable recoveries, permitting a return in perfect health as soon as the assessment has been completed,—would be worth mentioning only because of the truly great efficiency of the air, and the high degree of skill of physicians, in foreign states and jurisdictions, at those particular periods when home assessing officers are performing their official functions.

Many thousands of acres of the pine lands of Michigan were, and are, of no considerable value, except for the timber that stood upon them. Millions of dollars of taxes have been lost to the state in this manner: A lumberman desired the timber upon a certain tract of land; taxes when due become a debt from the party to whom the land is assessed; the lumberman desiring to buy the timber would either buy it on a contract without having the contract recorded; or if a deed were executed, it would be to some person wholly irresponsible, usually some employee. Lands cannot be sold for taxes until the third year after they have been assessed; before any sale could be made all timber would have been re-

moved, the vacant, worthless land would be all that was left, and this would be "bid in" by the state, which, in thousands of cases, has never been able to realize sufficient to pay the expenses of advertising, sale, etc.

Evasions of the law of the same class cannot long continue. When they are discovered and corrected, others follow to take their place. Is it to be wondered at that the law, lawyers, courts, and judges are under fire, subject to criticism? There will, and can, be no permanent remedy, until the legal profession is restored to its former high standing,—when the successful, the prominent, and the respected attorney, the man at the head of his profession, the one most beloved and respected, was the lawyer who knew the law, and who was willing to take no position other than that which would cause the law, as he knew it, to be enforced.

President Wilson, in an address before the Kentucky Bar Association, July 12, 1911, said:

"The truth is that the technical training of the modern lawyer, his professional prepossessions, and his business involvements, impose limitations upon him, and subject him to temptations which seriously stand in the way of his rendering the ideal service to society which is demanded by the true standards and canons of his profession. Modern business, in particular, with its huge and complicated processes, has tended to subordinate him, to make of him a servant, an instrument, instead of a free adviser and a master of justice."

The lawyer owes it to himself, he owes it to his high profession and noble calling, and he owes it to his country, if our liberties are to be maintained and preserved, to refrain from assisting in any evasion of the law, and to insist that the law shall, at all times, be the rule of his conduct, professionally as well as personally; with that stand taken by the legal profession, evasion of the law must and will cease.

Influence of the Lawyer

The state is founded upon law. The lawyer from study and experience knows, or ought to know, what laws are best adapted to changing conditions, for as conditions change, the laws necessarily change with them. In our democratic land he naturally gravitates to public affairs. Like the minister, he is an oracle of village life, and in cities he is accustomed to deal with civic questions. He has always been what the liberal training of his profession makes him, a champion of freedom and a leader of human thought and progress. The world has made vast advance in all matters of legislation and law, justice and liberty during the present century, and the lawyer has always been in the forefront of the struggle.—Hon. W. W. Goodrich.

The Trust Problem in the United States

BY PAUL H. DITZEN, A. M,. Ph. B.
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[Ed. Note.—This is the first of a series of able articles by Mr. Ditzen on this highly important and timely subject.]

THE political campaign of 1912 focused the attention of the American people upon the solution of the trust problem. All of the political parties promised remedies in their platforms for the evils of great combinations and monopolies. The Republican party, which had been in power continuously for sixteen years, and which had carried on through the administrations of Roosevelt and Taft continuous war against the combinations by the rigid enforcement of the Sherman anti-trust law, declared in its platform at Chicago:[1]

"Monopoly and privilege.—The Republican party is opposed to special privilege and to monopoly. It placed upon the statute book the interstate commerce act of 1887 and the important amendments thereto, and the anti-trust act of 1890, and it has consistently and successfully enforced the provisions of these laws. It will take no backward step to permit the re-establishment in any degree of conditions which were intolerable.

"Experience makes it plain that the business of the country may be carried on without fear or without disturbance, and at the same time without resort to practices which are abhorrent to the common sense of justice. The Republican party favors the enactment of legislation supplementary to the existing anti-trust act, which will define as criminal offenses those specific acts that uniformly mark attempts to restrain and monopolize trade, to the end that those who honestly intend to obey the law may have a guide for their action, and that those who aim to violate the law may the more surely be punished.

"The same certainty should be given to the law prohibiting combinations and monopolies that characterizes other provisions of commercial law, in order that no part of the field of business opportunity may be restricted by monopoly or combination, that business success honorably achieved may not be converted into crime, and that the right of every man to acquire commodities, and particularly the necessaries of life, in an open market, uninfluenced by the manipulation of trust or combination, may be preserved.

"Federal trade commission.—In the enforcement and administration of Federal laws governing interstate commerce and enterprises impressed with a public use engaged therein, there is much that may be committed to a Federal trade commission, thus placing in the hands of an administrative board many of the functions now necessarily exercised by the courts. This will promote promptness in the administration of the law and avoid delays and technicalities incident to the court procedure."

The Democratic party, in Baltimore, a week later pledged itself to a programme as follows:[2]

"Anti-trust law.—A private monopoly is indefensible and intolerable. We therefore favor the vigorous enforcement of the criminal as well as the civil law against trusts and trust officials, and demand the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States.

"We favor the declaration by law of the conditions by which corporations shall be permitted to engage in interstate

[1] The World's Almanac, p. 691.

[2] The World's Almanac, p. 687.

trade, including, among others, the prevention of holding companies, of interlocking directors, of stock watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions.

"We condemn the action of the Republican administration in compromising with the Standard Oil Company and the Tobacco Trust, and its failure to invoke the criminal provisions of the anti-trust law against the officers of those corporations after the court had declared that, from the undisputed facts in the record, they had violated the criminal provisions of the law.

"We regret that the Sherman anti-trust law has received a judicial construction depriving it of much of its efficacy, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation."

The new party, the Progressives, whose avowed purpose is to thwart the power of the "Invisible Government," and to return to the people their lost political power, advanced the following remedy:[3]

"We therefore demand a strong national regulation of interstate corporations. The corporation is an essential part of modern business. The concentration of modern business, in some degree, is both inevitable and necessary for national and international business efficiency. But the existing concentration of vast wealth under a corporate system, unguarded and uncontrolled by the nation, has placed in the hands of a few men enormous, secret, irresponsible power over the daily life of the citizen,—a power unsufferable in a free government and certain of abuse.

"This power has been abused in monopoly of national resources, in stock watering, in unfair competition and unfair privileges, and, finally, in sinister influences on the public agencies of state and nation. We do not fear commercial power, but we insist that it shall be exercised openly, under publicity, supervision, and regulation of the most efficient sort, which will preserve its good while eradicating and preventing its evils.

"To that end we urge the establishment of a strong Federal administrative commission of high standing, which shall maintain permanent active supervision over industrial corporations engaged in interstate commerce, or such of them as are of public importance, doing for them what the government now does for the national banks, and what is now done for the railroads by the Interstate Commerce Commission.

"Such a commission must enforce the complete publicity of those corporate transactions which are of public interest; must attack unfair competition, false capitalization, and special privilege, and by continuous trained watchfulness guard and keep open to all the highways of American commerce. Thus the business man will have certain knowledge of the law and will be able to conduct his business easily in conformity therewith, the investor will find security for his capital, dividends will be rendered more certain, and the savings of the people will be drawn naturally and safely into the channels of trade.

"Under such a system of constructive regulation, legitimate business free from confusion, uncertainty, and fruitless litigation will develop normally in response to the energy and the enterprise of the American business man."

The Socialists, finally, declared their solution according to their principles previously advanced:[4]

"Collective ownership.—First. The collective ownership and democratic management of railroads, wire and wireless telegraphs and telephones, express service, steamboat lines, and all other social means of transportation and communication and of all large scale industries.

"Second. The immediate acquirement by the municipalities, the states, or the Federal government of all grain elevators, stock yards, storage houses, and other distributing agencies, in order to reduce the present extortionate cost of living.

"Third. The extension of the public domain to include mines, quarries, oil wells, forests, and water power."

[3] The World's Almanac, p. 694.

[4] The World's Almanac, p. 699.

The candidates for presidents, the mouthpieces of their parties, laid chief stress during the campaign on the trust problem. Mr. Roosevelt maintained that the trusts should be regulated strictly. Mr. Wilson declared for the enforcement of the Anti-trust law and for the play of competition.

Mr. Taft, in his speech of acceptance, favored amendments to the Anti-trust law which would define what acts constitute unfair trade and unlawful monopolies, and recommended that combinations engaged in interstate commerce be permitted to take out Federal charters.[5] From the foregoing declarations of party principles and the speeches of presidential candidates, it is evident that the trust problem is uppermost in the minds of the people.

The History of Combination in the United States.

The evolution of combination in the United States is marked by our industrial history. As the nation's industries developed there was a gradual movement toward closer and closer combination. In colonial days manufacturing was virtually unknown.[6] The people lived by agriculture. The village blacksmith made the simple tools needed on the farm. Since land was plenteous it was more profitable to engage in farming than in manufacturing. Most of the manufactured articles were imported from Europe.

However, in the course of time, some small industries developed. As early as President Washington's administration, the subject of manufactures was considered important from both "national and an economic standpoint." In a letter to Thomas Jefferson he stated that manufactures and inland navigation were among the most important objects of internal concern that occupied the public mind. Alexander Hamilton, the first Secretary of the Treasury, in his first report on manufactures, mentioned many articles which were produced in this country, among which were gunpowder, tobacco, carriages, tinware, fur and woolen hats, refined sugar, paper, spirits and liquor, bricks and tile, hemp and cordage.

During this early period men engaged in business or in farming for themselves; they were independent. Of course, partnerships existed; they existed in England centuries before. Corporations also were formed in these early days. In fact, they had existed among the Greeks and Romans.[7] But the business of the corporation was small. Factories were few in number. English legislation retarded our factory system. The English desired to control the American markets and tried to prevent our enterprising business men from building and equipping factories. But plans were smuggled into the United States. New machines were invented. In 1793 Eli Whitney devised the first cotton gin.[8] Because of the adaptability of the soil, the South became the center of cotton growing and the manufacture of cotton goods.

This manufacturing movement received great impetus during the Napoleonic Wars, when England and France forbade neutral vessels from trading with us, and virtually declared whole Europe in a state of blockade.[9] The War of 1812, which was fought shortly afterward, prevented the importation of goods from European countries. After the War, in 1815, a tariff bill was enacted into law. It was necessary to protect the infant industries which had sprung up during the War. The early statesmen recognized that the tariff was of great assistance in the development of an industrial nation.

Thus the nation progressed. During the administration of President Jackson unparalleled development was witnessed on every hand. What is now known as the central part of our country was opened up for settlement by thousands who crossed the Alleghany mountains.

[5] Republican Campaign Text-book (1912) pp. 18, 19.

[6] Chapters 1-3 of "Modern Industrialism," by Prof. F. L. McVey, are replete with facts concerning the evolution of industry in the United States.

[7] 1 Dill. Mun. Corp. p. 3; 7 Am. & Eng. Enc. Law, p. 632.

[8] Rochleau, vol. 7, Progressive Citizenship Series, U. S. History, p. 111.

[9] Garnier-Lodge U. S. Hist. vol. 2, p. 714; Rochleau, 7 Prog. Cit. Series, p. 200.

The railroad was built on the path marked out by the pioneer and carried manufactured products to all parts of the country. The panic of 1837, like all panics, checked the economic growth to some extent. But the discovery of gold in California revived prosperity. Corporations began to find favor in the various states in about the year 1848. Men began to realize that if this nation was to be developed and its resources made useful, that large sums of capital, which only many men could subscribe, would be required. There was general growth until 1860.

The Civil War demoralized industry to an immeasurable degree, but after the War the people turned their concentrated attention to industrial pursuits. Factories rose phœnix-like from the ashes of the war-stricken states. The latter half of the nineteenth century witnessed remarkable development in industries of every kind. Railroads were built connecting the Atlantic and Pacific oceans. Between 1880 and 1890, 72,983 miles of roadbed were laid.[10] America had become, at the beginning of the twentieth century, one of the great manufacturing nations of the world. Our exports in 1800 amounted to $70,971,780; in 1910 they amounted to $9,821,205,387, or to $100 per capita.[11]

As the great industries developed there was a greater combination among capitalists. During the eighties the trust movement began. In 1882 the standard oil trust was formed. Later on, in 1887, the whisky trust and other large trusts were formed.[12] But especially within the last fifteen years has the movement toward combination been notorious. In 1897 there were 111 trusts in the United States. In the year 1898, 98 trusts were formed. A census bulletin issued in 1901 shows that there were 183 combinations in the United States.[13] President Van Hise, in his recent book, "Concentration and Control," estimates that there are about 500 trusts or combinations in our country to-day.[14]

There was marked evolution in the process of combination. The modern centralized system of industry was not perfected in a day. The development of these combinations is an interesting study. The simplest form of a combination is a partnership. A partnership is composed of two or more persons who have combined their abilities or their wealth to engage in a common business to receive the profits arising therefrom.[15] Each member is responsible for the full liability of the partnership. Joint stock associations differ from partnerships in that the members are limited in their liability. A corporation has been defined as "a legal entity created by the law, having unlimited succession, and in which the members are limited in liability."[16] These are forms of combinations which might very well tend to restrain trade, but which have been recognized by the law. These forms, especially partnerships and corporations, existed at an early period in our country.

Fifty years ago the movement toward combination among industries was begun. Competition grew too strong and ruinous pools were formed. They began to be formed in the sixties. A pool consisted of an agreement among several competitors by which they agreed on certain rates or prices.[17] But each member of the pool generally retained its own management. On account of bad faith at times, but chiefly on account of the prosecutions by the states, pools were broken up.

The next method adopted was the trust. The Standard Oil Trust was formed

[10] 10 Nelson's Enc. 166.

[11] Republican Campaign Text-book (1910), Exports, pp. 119, 120; Manufactures, p. 203.

[12] Laughlin, Industrial America, p. 101.

[13] Census Bulletin, No. 122, Dec. 30, 1901.

[14] Van Hise, Concentration and Control, p. 35.

[15] "A partnership is a contract relation subsisting between persons who have combined their property, labor, or skill in an enterprise or business as principals for the purpose of joint profit." Bates, Partn. p. 1.

[16] "A private corporation is a voluntary union of persons, joined together by written articles of association or incorporation under legislative authority, or by special statute on proper application to the legislature, to accomplish some pecuniary or ideal purpose authorized by the governing body of a state." Thomp. Corp. 2 ed. p. 2.

[17] "Pooling is an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits." American Biscuit & Mfg. Co. v. Klotz, 44 Fed. 725.

in 1882. The several competitors transferred their shares of stock to trustees, who held the property of all the members and issued trust certificates in turn to the stockholders of the uniting corporations. When this form was declared illegal by the courts the capitalistic corporation was invented.

This was a new method. All of the individual plants or corporations sold out to one company which issued shares of stock to the stockholders of the uniting corporations, and the business was run as one large corporation. However, this method has also been declared illegal by the Supreme Court in the recent Standard Oil and Tobacco Cases, in case an unreasonable restraint of trade or commerce is affected thereby. The Standard Oil Company has met the court's decree by allowing the stockholders in the chief corporation to become stockholders in all of the individual corporations. These large combinations are commonly known as trusts, although technically the trust does not exist; they might be termed "capitalistic combinations," or, as Professor Jeremiah Jenks calls them, "capitalistic monopolies." [18]

Causes of Combinations.

The natural question that the economist asks is, "What are the causes of this trust movement, this formation of combinations?" Here we find a great diversity of opinion. In the reports of the industrial commission, dealing with trusts and combinations, are found the various views of men who testified before the commission. It will be well to take up each cause separately.

1. The tariff.—Mr. H. O. Havemeyer, president of the sugar trust, was probably the most insistent witness on this subject. He laid all the evils of the trust problem at the door of the customs tariff law.[19] The Democratic party has taken a like view, and has laid the blame of the formation of the trusts on the Republican party, which has been the champion of protection. But the facts do not prove their case.[20] For great trusts are found in free trade countries, like England and Canada. However, it cannot be successfully denied that the tariff has contributed to the formation and the maintenance of some of the trusts in the United States. It has been a wall by which certain domestic industries have been permitted to flourish while foreign competition has been prevented. Many are now advocating that the tariff on trust-made articles be removed or lowered, and thereby expect to solve the trust and tariff question.

2. Large scale production.—Another reason for the growth of the trusts was the desire on the part of the promoters of big business to secure the greatest profits possible. This could only be accomplished by amassing a large amount of capital. It takes millions of dollars to equip a great manufacturing plant. When they united their capital they were enabled to engage in production on a large scale. With large plants the by-products were made use of and often proved to be as valuable as the chief product itself.

3. Competition.—The underlying cause of the formation of the great industrial combinations was what has been correctly termed, "cut-throat competition." [21] The situation was this: There were a great many plants, corporations, or private persons engaged in manufacturing the same articles. All were selling their products in the same markets, and each was trying to secure the greatest profits for himself. For that reason each manufacturer had to hire expert salesmen, and was required to do a great deal of advertising. The expense was great. Another thing, each manufacturing concern would cut its prices at times, and, as a matter of course, if the others wished to sell their goods they had to lower their prices also. This condition was too expensive. So it was but natural that these capitalists, who wanted to se-

[18] Jenks, The Trust Problem, p. 8.

[19] 1 Report of the Industrial Commission, 101. "The mother of all trusts is the customs tariff bill. The existing bill and the preceding ones have been the occasion of the formation of all the large trusts, with very few exceptions, inasmuch as they provide for an inordinate protection to all the interests of the country, sugar refining excepted." From the testimony of H. O. Havemeyer.

[20] Jenks, The Trust Problem, p. 228.

[21] Chapter II. of The Trust Problem by Jenks on "The Wastes of Competition."

cure the greatest amount of profits, should combine and eliminate the wastes of competition. By combining they were not required to do so much advertising; they were able to dispense with most of their salesmen; they controlled the output and thus avoided the evil results of over-production.

4. Desire to control the market.—This has been cited as another reason that there has been such a great concentration of business in the business world. Great capitalists are like great kings who like to rule, like soldiers who like to win in battle, and like men everywhere who like to succeed. The desire of some of these men is to come to the front in the industrial world, to control the market, to determine the price to be paid. A capitalist wants to rule. He strives to make his business supreme. Thus such epithets as "railroad king" and "trust magnate" have been applied to great capitalists. Senator Sherman was aware of this in 1890. In a speech on the bill which he introduced he said, "If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity."

Evils of the Trust.

With the trust movement, there were many evils that grew up. There is no doubt that the trust has its advantages; these will be considered in a later chapter. But there were many evil practices indulged in which were contrary to law and morals. They are considered monopolies, as great monsters that threatened the perpetuity of the Republic. The evils of the trust will now be discussed.

1. Ruin of rivals.—The promoter of the trust, who failed to succeed in getting every manufacturer to unite with him in the trust, resolved to crush his rivals out. For that reason the prices of goods were lowered in certain localities where the rival was in power. The trust could afford to reduce the price in certain localities if it could maintain higher prices in other territory. And after the rival had been crushed out or had been forced to sell out to the trust, the prices were generally raised so that the loss of the "crushing-out process" was overcome. The result was the competition was stifled and many worthy manufacturers were forced against the wall. The methods were scandalous. Everything was resorted to to ruin small business. It is stated that the Standard Oil Company delivered barrels of kerosene in Kansas, broke open the heads, and invited the people to help themselves. In other cases the prices were cut below the cost of production; consequently the small producer was forced to surrender or to die.

2. Railroad rebates.—The railroads, by various discrimination of rates, aided materially in building up the great industrial combinations. The Standard Oil Company achieved much of its power on account of this favoritism on the part of the railroads. Transportation is of the greatest importance in the conducting of a manufacturing establishment. And so when the railroads favored a big combination by offering rebates, these could well afford to cut prices and destroy their rivals who were forced to pay full rates.

3. Stock watering.—There has always been a tendency on the part of large trusts to "water," or greatly increase their capital stock. Often it is increased to a much higher point than a physical valuation of the properties or its earning capacity would warrant. The reason for watering stock lies in the fact that such a trust often obtained enormous dividends, a fact that would naturally invite other capital to flow into that industry. So, if the capital stock were increased, the dividends, although great, would appear small as a per cent of the whole capital stock, and investors would be deceived into believing that the business was not profitable.

The evils of stock watering are: First, the public is deceived. A man will buy a share of stock for $100 which in reality is worth $25 of the physical valuation of the property of the corporation.

Second, stock watering has also led to gambling on the market. The fact that a share of stock has an unreal and fic-

titious value causes the holder thereof to sell it at a high price if possible. During the year 1909 the total number of shares traded in at the New York Stock Exchange amounted to $19,324,230,420,[22] —an amount equivalent to about one sixth of the nation's wealth.

4. Privilege.—One of the reasons why these great capitalistic corporations have fallen into popular disfavor is because they have exercised secret power in governmental affairs. They have contributed large sums to the political parties without discrimination and principle. It is said that Jay Gould once said, "When the legislature is Republican I am a Republican; when it is Democratic I am a Democrat, but I am always an Erie man." These combinations have sent lobbyists to the legislatures and to Congress, and have secured legislation which benefited them alone, and did not subserve the best interests of the people. They have been accused of having influenced and bought judges and courts. While some instances may be proved, still as a whole our judiciary has been fair and unapproachable.

5. High prices.—Have the trusts raised prices? This is a question which is of the greatest importance in this discussion. It has been asserted that the law of supply and demand no longer controls in the United States, but that the prices are set and made by these producers, who limit the output of their products and force their own prices upon the people.[23] While some trusts have lowered prices, it is a doubtful question whether the tremendous concentration of industry in our country has resulted in a general reduction of prices. It is true that they had splendid opportunities to lower prices on account of their many facilities, but did not do so. And in most cases the prices have been as high as it was possible for the trust to put them. It must be remembered that we have not yet approached a period of absolute monopoly in this country. There has been abundant capital, and when it became evident that a certain business was very profitable, capital flowed in that direction and new industries were begun. What the future will be, we cannot tell, but it is morally certain that the trusts will endeavor to raise the prices as high as possible.

6. Monopoly.—This evil has already been mentioned in the preceding paragraph. While it is true that the stage of absolute monopoly has not yet been reached in this country, we are fast approaching it. The great combinations tend to swallow up their rivals which still do business. And it is said by many writers that we are at a stage of practical monopoly in this country, because the trusts are able to dictate the prices of the raw product which they buy and the manufactured article which they sell. The great evil lies in this; the trust men can limit the output and refuse to supply the demand. If the demand is great almost any price will be paid. Extortion can thus be practised.

The Trust Problem.

The existence of the capitalistic corporation, the capitalistic monopoly, has given the American people the economic problem of the last quarter of the nineteenth and the first quarter of the twentieth century. These industries are here to supply a demand. They have become a necessity to satisfy the wants of the nation's consumers. They provide men and women with the necessaries of life.

But at the same time, with their growth, evils have sprung up,—evils which are proving to be a menace to our political institutions,—evils which affect the life of every individual. The situation has been and is one that demands the attention of law-makers, who realize that law should be designed to promote justice and equality,—in other words, to conserve the interests of the public.

(To be continued)

[22] 11 Nelson's Enc. 464.

[23] Attorney General Wickersham in a speech before the Minnesota State Bar Association, July 19, 1911 said: "But the fact is that the law of supply and demand does not, and has not for many years worked in this country in a natural, unrestrained, and unfettered manner."

Judgments as Voidable Preferences

BY GEORGE J. COUCH

IT is the purpose of the present article to treat the various decisions which have involved the question whether a judgment obtained within the four months' period preceding bankruptcy may be avoided by the trustee as a wrong upon other creditors of the bankrupt. The answer to this query depends upon the construction to be placed upon those sections of the bankruptcy act which define preferences, state the consequences thereof, and provide a remedy, which, in the case of a judgment obtained within the four months' period, are § 60, subdivisions a and b, and § 67, subdivisions c and f. These provisions will be taken up in the order enumerated.

Section 60, Subdivisions a and b.

By § 60a of the bankruptcy act of 1898,[1] a preference was defined as follows: "A person shall be deemed to have given a preference if, being insolvent, he has [within four months before the filing of the petition or after the filing of the petition and before the adjudication] procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." In 1903[2] the original section was amended by the addition of the following clause: "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if, by law, such recording or registering is required," and by the insertion of the clause set out in brackets above.

And § 60b of the original act, which states a consequence of and gives a remedy against preferences as defined by § 60a, provided that "if a bankrupt shall have given a preference within four months before the filing of a petition or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." In 1903 this section was amended by omitting the clause, "within four months before the filing of a petition, or after the filing of the petition and before the adjudication," and by the addition of the following clause: "And for the purposes of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." The section was again amended in 1910[3] by changing that part of the section reading, "Had a reasonable cause to believe that it was intended thereby to give a preference," so as to read, "Have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference." The present question, however, is not materially affected by the amendment of 1910, for which reason it will be unnecessary to enter into a discussion of the effect of this change upon the question of intent.[4]

[1] Act of July 1, 1898, chap. 541, 30 Stat. at L. p. 562, U. S. Comp. Stat. 1901, p. 3445.

[2] Act of February 5, 1903, 32 Stat. at L. 799, chap. 487, § 13, U. S. Comp. Stat. Supp. 1909, p. 1314.

[3] Act of June 25, 1910, chap. 412, § 11, 36 Stat. at L. 838, U. S. Comp. Stat. Supp. 1911, p. 1506.

[4] An interesting discussion of this question may be found in the note to Schmidt v. Bank of Commerce, 33 L.R.A.(N.S.) 558, which treats the general question of intent on the part of the bankrupt to create a preference as a condition of a voidable preference under § 60b.

Comparatively few cases which fall within the scope of this article have involved questions arising under § 60, subdivisions a and b. This is undoubtedly due to the fact that in most cases § 67f affords an easier method for the trustee to pursue, since, under that section, he need not prove that the bankrupt intended to give a preference, or that the creditor had reasonable cause to believe that the enforcement of the judgment would effect a preference. As a matter of fact it would seem advisable for the trustee to proceed under 60b only when a lien has been created, a levy and sale had, and the proceeds paid to the debtor before the filing of the petition, in which case § 67f would not apply, because, under the decisions, as hereinafter shown, that section applies to liens only.

In the first place it should be remembered that § 60, subdivisions a and b, does not provide for the maintenance of summary proceedings in the bankruptcy court to compel the execution creditor to refund proceeds which have been paid over to him, but rather authorizes an independent plenary suit to recover the property or its value.[5]

And, in the second place, allegation and proof of the various elements outlined in § 60, subdivisions a and b, are essential to the trustee's right of action thereunder. A complaint which has received judicial approval as having sufficiently alleged a voidable preference under § 60, subdivisions a and b, is that in Grant v. National Bank, 197 Fed. 581, it having been alleged therein that an insolvent debtor voluntarily confessed judgment on past due notes; that the debtor was insolvent; that the creditor had reasonable cause to believe that the transaction would work a preference; that both parties intended to work a preference as against other creditors of the same class; and that the transaction was carried out with the intent to hinder, delay, and defraud the other creditors; and that the proceedings had that effect. And it would seem that all of these allegations are necessary. Illustrations of this are afforded by holdings to the effect that petitions based upon § 60b to avoid alleged preferential judgments, which failed to allege that the preferred creditors had reasonable cause to believe that the bankrupt by suffering judgment intended to cause a preference within the meaning of the bankruptcy act, were insufficient.[6] But under this section it is not necessary to show that there was an actual agreement or understanding by which it was understood between the parties that the creditor should be allowed to obtain the judgment without regard to legal rights.[7]

Likewise § 60b does not authorize the recovery of property or its value if sold under execution issued upon a judgment obtained within the four months' period, where the execution creditor had no reason to suspect that the bankrupt intended to give him a preference by suffering the judgment to be taken.[8]

The clause as to insolvency was under consideration in Chicago Title & T. Co. v. John A. Roebling's Sons Co. 107 Fed. 71, 5 Am. Bankr. Rep. 368, 3 N. B. N. Rep. 355, it having been held therein that obtaining a judgment, and causing a levy to be made upon a manufacturing plant and a sale under such levy, did not create a preference in favor of the judgment creditor, under § 60, where the manufacturing plant as a going concern brought the debtor's assets above his liabilities, although the levy and sale brought the total assets to a figure below the liabilities, and the creditor had reasonable cause to believe that such levy and sale would cause insolvency, since the debtor could not be considered "insolvent" at the time of the levy within the meaning of the act. Nor can the court strike off a judgment regular on its face, because entered within four months of the filing of the petition in bankruptcy, where the allegation that

[5] Re Bailey, 144 Fed. 214; Re Resnek, 167 Fed. 574; Re Weitzel, 191 Fed. 463; Starbuck v. Gebo, 48 Misc. 333, 96 N. Y. Supp. 781. See also Grant v. National Bank, 197 Fed. 581.

[6] Greene v. Montana Brewing Co. 28 Mont. 380, 72 Pac. 751; Johnson v. Anderson, 70 Neb. 233, 97 N. W. 339; Starbuck v. Gebo, 48 Misc. 333, 96 N. Y. Supp. 781; Levor v. Seiter, 69 App. Div. 33, 74 N. Y. Supp. 499, 8 Am. Bankr. Rep. 459, reversing 34 Misc. 382, 69 N. Y. Supp. 987.

[7] Gabriel v. Tonner, 138 Cal. 63, 70 Pac. 1021.

[8] Nelson v. Svea Pub. Co. 178 Fed. 136.

the debtor was insolvent at the time of the judgment, within the meaning of the bankruptcy act, is denied.[9]

The force of § 60a cannot be avoided, however, by the fact that payments necessary to discharge judgment liens were made by a purchaser from the bankrupt by appropriating the purchase price to clear off the liens in order to have an unencumbered title, as in such case the significant thing is that, by virtue of the judgment, the creditor is paid out of the property of the bankrupt as against other creditors not so favored.[10]

But where the judgment does not itself create a lien, but merely perfects a lien obtained before the four months' period, § 60 does not entitle the trustee to avoid the lien, or to recover the proceeds, even though the judgment was entered with the consent of the bankrupt in favor of one who knew that a preference was thereby intended.[11] In reaching this conclusion the New Hampshire court said: "In answer to the argument based upon these provisions [§§ 60a and 60b], it is sufficient to say that the preference consists in the debtor's suffering a judgment to be entered against him, the enforcement of which would result in the appropriation, for the benefit of the judgment creditor, of specific property of the debtor, which would otherwise be held for all the common creditors. But in this case, before the entry of the judgment which it is claimed constituted the preference, the defendant's attachment lien had become a valid security as against the subsequent proceedings in bankruptcy. The defendant had become a secured creditor, and when the petition in bankruptcy was filed, he was not a creditor 'of the same class' he was in when he brought his suit. Then he was an unsecured creditor, as against proceedings in bankruptcy which might have been instituted within four months. After the expiration of that period, and in the absence of action against the debtor's estate under the bankruptcy law, the defendant became a secured creditor."

Where a judgment voidable under §§ 60a and 60b has been obtained within the four months' period, and execution has been issued and the property sold to satisfy the lien, the measure of the recovery is the property itself or its value, and not what it brought on the execution sale.[12]

Section 67, Subdivisions c and f.

Some courts seem to regard subdivision c of § 67 [13] as destroyed by the subsequent introduction of subdivision f; [14] and a number of cases which fall

[9] Exler v. American Box Co. 226 Pa. 386, 134 Am. St. Rep. 1067, 75 Atl. 661.

[10] Benjamin v. Chandler, 142 Fed. 217.

[11] Hurlbutt v. Brown, 72 N. H. 235, 55 Atl. 1046.

[12] Gabriel v. Tonner, 138 Cal. 63, 70 Pac. 1021.

[13] Section 67c provides that "a lien created by, or obtained in or pursuant to, any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if (1) it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference: or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy; or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien, and empowered to perfect and enforce the same in his name as trustee, with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

[14] Section 67f provides: "That all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien of a bona fide purchaser for value, who shall have acquired the same without notice or reasonable cause for inquiry."

within the scope of the present discussion have laid down the rule that the two subdivisions are antagonistic, and that in case of conflict the latter must control; the ground being that where two or more provisions of an act are clearly repugnant beyond possibility of reconciliation the latter vacates the former.[15] This rule was generally invoked for the purpose of obviating all question as to whether the debtor suffered or permitted the judgment lien to be obtained, or whether the creditor had knowledge of the debtor's insolvency, which are essential elements under subdivision c of § 67. And under this rule all judgment liens obtained within the four months' period have been held to be annulled under § 67f by the bankruptcy proceedings, irrespective of the elements before referred to.[16] And § 67f has been held to supersede § 67c, so as to bring judgment liens obtained within the four months' period within the penalty of the act, although the suit in which the lien was obtained was begun prior to the four months' period, which lien could not be avoided under § 67c.[17]

And although it must be conceded that subdivision f supersedes subdivision c, where the two conflict, as they obviously do in many instances, it seems that subdivision c does not in all respects conflict with subdivision f, as it provides for at least two classes of cases which are not covered by the latter subdivision. The first of these arises under clause 2, which provides that a judgment obtained by confession in a proceeding begun within four months of the filing of the petition shall be dissolved by the adjudication, if "the party or parties to be benefited thereby had reasonable cause to believe that the defendant was insolvent and in contemplation of bankruptcy," in that a judgment is avoided under subdivision f only when obtained against a person who "is insolvent," while under clause 2 of subdivision c actual insolvency would not be a necessary element, provided the party to be benefited "had reasonable cause to believe" that the debtor was insolvent. The second class of cases for which provision is made by subdivision c, and which do not fall within subdivision f, arise under clause 3, in that a lien might be avoided thereunder because it was "sought and permitted in fraud of the provisions" of the act, which would not fall within subdivision f, unless the bankrupt was insolvent when the lien was created. From this it follows that subdivision f, because of its broad scope, should be regarded as stating the general provisions applicable to judgments and liens obtained within the four months' period, and subdivision c, as setting up exceptions thereto.

But no case involving a judgment obtained within the four months' period seems to have arisen which would fall within subdivision c and not at the same time within subdivision f.

A number of decisions have been rendered, however, which involve subdivision c. Thus, in Re Richard, 94 Fed. 633, a confessed judgment obtained in an action commenced within four months before the filing of the petition for bankruptcy against an insolvent was held avoided by § 67c.

But § 67c by its terms does not apply where the suit or action was not commenced within four months before the filing of the petition in bankruptcy, and therefore judgments obtained within that period would not be affected, provided the action was not commenced within such period,[18] so that the complaint should allege that the action in which the judgment was obtained was commenced within four months, as well as that the judgment creditor had reasonable cause to believe the debtor was insolvent or in contemplation of bankruptcy, and that the existence and enforcement of the judgment would work a preference.[19] But it has been held that this provision does not necessarily refer to the beginning of the action or

[15] Re Richards, 37 C. C. A. 634, 96 Fed. 935, 3 Am. Bankr. Rep. 145, 2 N. B. N. Rep. 38; Re Rhoads, 98 Fed. 399, 3 Am. Bankr. Rep. 380, 2 N. B. N. Rep. 301.

[16] Re Richards, 37 C. C. A. 634, 96 Fed. 935, 3 Am. Bankr. Rep. 145, 2 N. B. N. Rep. 38.

[17] Re Vaughan, 97 Fed. 560, 3 Am. Bankr. Rep. 362, 2 N. B. N. Rep. 101.

[18] Re De Lue, 91 Fed. 510, 1 Am. Bankr. Rep. 387; Re O'Connor, 95 Fed. 943, 2 N. B. N. Rep. 90; Re Crafts-Riordon Shoe Co. 185 Fed. 931.

[19] Severin v. Robinson, 27 Ind. App. 55, 60 N. E. 966.

suit itself, but rather to the beginning of that part or branch of the proceeding the special object of which was to secure a lien on property of the debtor; but this element would seem to be inapplicable to the class of cases under consideration herein, since the special object necessarily is the obtaining of a judgment lien.[20] In Ferguson v. Greth, 195 Pa. 272, 78 Am. St. Rep. 812, 45 Atl. 735, however, it was held that a proceeding is "begun," within the meaning of § 67, on the date when the judgment is actually entered, and not upon an earlier date, upon which its entry was authorized. But if this interpretation were generally adhered to, it would render § 67c as broad as § 67f as regards time, but no other case seems to have advanced or adopted the above theory.

—subdivision f.

With the exception of the two classes above referred to as falling within the terms of subdivision c, and not within those of subdivision f of § 67, it would seem advisable for the trustee to attack a judgment obtained within the four months' period under subdivision f, and as a matter of fact very few cases will arise where it will be found necessary to proceed under subdivision c. For this reason, § 67f is the provision of importance, as nearly every judgment or judgment lien which can be avoided by the trustee will be avoided, if at all, by virtue of the provision of that subdivision.

As a matter of fact, § 67f undoubtedly was enacted merely for the benefit of the trustee and the creditors claiming through him. This conclusion is supported not only by numerous decisions which do not belong to the class being treated herein, but by an adjudication of the supreme court of Illinois, to the effect that a judgment debtor cannot avoid, for his own sole benefit, a judgment lien obtained within the four months' period.[21]

Another important question, and one upon which there has been a conflict of authority, is whether § 67f avoids the judgment or merely the lien arising therefrom, the weight of authority being to the effect that it is the lien only which is avoided. Thus it is held that all judgment liens obtained against an insolvent within the four months' period are null and void under § 67f, and that the only tests as to validity are the date of the lien and the insolvency of the debtor at such date,[22] but that the judgment itself, although obtained within the four months' period, is not avoided by the provision of 67f, for the reason that it applies to the judgment lien only.[23] On the other hand, the courts in some cases seem to have regarded the judgment itself as voided by subdivision f of § 67.[24] But those cases which involve judgments taken to effectuate a pre-existing lien are, of course, distinct from cases in which the judgment itself creates a lien.

[20] See Re Higgins, 97 Fed. 775, 3 Am. Bankr. Rep. 364, 2 N. B. N. R. 115.

[21] Miller v. Barto, 247 Ill. 104, 93 N. E. 140. See also Frazee v. Nelson, 179 Mass. 456, 88 Am. St. Rep. 391, 61 N. E. 40; and Hutchins v. Cantu, — Tex. Civ. App. —, 66 S. W. 138.

[22] Re Pease, 4 Am. Bankr. Rep. 547; Re Richards, 37 C. C. A. 634, 96 Fed. 935, 3 Am. Bankr. Rep. 145, 2 N. B. N. Rep. 38; Re Rhoads, 98 Fed. 399, 3 Am. Bankr. Rep. 380, 2 N. B. N. Rep. 301; Re English, 62 C. C. A. 572, 127 Fed. 940; Re Builders' Lumber Co. 148 Fed. 244, affirmed in 85 C. C. A. 165, 157 Fed. 801; Re Green, 179 Fed. 870 (lien of a judgment for a fine for illegally selling intoxicating liquors); Re Ransford, 115 C. C. A. 560, 194 Fed. 658; Mohr v. Mattox, 120 Ga. 962, 48 S. E. 410, 12 Am. Bankr. Rep. 330; Severin v. Robinson, 27 Ind. App. 55, 60 N. E. 966; Re Benedict, 37 Misc. 230, 75 N. Y. Supp. 165; Doyle v. Heath, 22 R. I. 213, 47 Atl. 213, 4 Am. Bankr. Rep. 705; Davis v. Jewett Bros. & Jewett, 17 S. D. 410, 97 N. W. 16.

[23] Re Pease, 4 Am. Bankr. Rep. 547; Doyle v. Heath, 22 R. I. 213, 47 Atl. 213, 4 Am. Bankr. Rep. 705; Davis v. Jewett Bros. & Jewett, 17 S. D. 410, 97 N. W. 16. See also Kinmouth v. Braeutigam, 63 N. J. Eq. 103, 52 Atl. 226, 10 Am. Bankr. Rep. 83.

[24] Re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815, 2 N. B. N. Rep. 599; Re Beals, 116 Fed. 530, holding that a judgment perfecting a garnishment lien in a proceeding commenced within four months before the petition in bankruptcy fell with the lien; D. C. Wise Coal Co. v. Columbia Lead & Zinc Co. 123 Mo. App. 249, 100 S. W. 680, holding that the judgment procured to support an attachment lien fell with the lien, where the lien and judgment were both obtained within the four months' period; and National Bank & L. Co. v. Spencer, 53 App. Div. 547, 65 N. Y. Supp. 1001 (general statement that judgment is void.)

In some cases it has merely been stated generally that the judgment and levy were void.[25]

But it is now settled that § 67f does not apply to judgments obtained within the four months' period, perfecting liens which existed prior to that period. Thus, although judgments obtained against an insolvent within four months of the filing of the petition in bankruptcy are in terms avoided by § 67f, such provision must be regarded as referring only to judgments creating liens, and not to judgments obtained within the four months' period enforcing or perfecting an otherwise valid pre-existing lien, or, in other words, that it is the lien created by the judgment that is invalid, and not a judgment which creates no lien itself.[26] And where an attachment lien is obtained more than four months before the bankruptcy, the creditor should be allowed to prosecute the lien to judgment and satisfy the same by sale of the property affected by the lien, although the judgment itself would be obtained within the four months' period.[27] This conclusion has been said to be the result of the fact that the judgment and execution do not affect the property with a lien, but only enforce the lien already existing, and that, therefore, it is not within the purview of § 67f,[28] as also that the various provisions of the act render it unreasonable to impute the intention to annul all judgments rendered within four months.[29]

But if the lien acquired before the four months' period is inchoate and to be valid perfecting by judgment is necessary, the judgments and executions taken and levied within the four months' period are void.[30]

And the same has been held true of other proceedings the judgments in which do not *per se* create a lien.[31]

Some decisions are to the effect that the bankruptcy act does not affect the lien of a judgment otherwise avoided which applies to property exempt under

[25] Re Richards, 95 Fed. 258 (petition for review dismissed in 37 C. C. A. 634, 96 Fed. 935, 3 Am. Bankr. Rep. 145, 2 N. B. N. Rep. 38); Re Breslauer, 121 Fed. 910, 10 Am. Bankr. Rep. 33.

[26] Metcalf Bros. v. Barker, 187 U. S. 165, 47 L. ed. 122, 23 Sup. Ct. Rep. 67, 9 Am. Bankr. Rep. 36 (lien created by filing judgment creditors' bill prior to four months' period); Re Blair, 108 Fed. 529, 6 Am. Bankr. Rep. 206, 3 N. B. N. Rep. 777 (lien of attachment on mesne process, perfected by judgment within four months' period); Re English, 122 Fed. 113, reversed in 62 C. C. A. 572, 127 Fed. 940, on the ground that the creditors had no lien except that given them by the judgment, and that that was cut off by the petition in bankruptcy (equitable lien upon partnership assets created by transfer more than four months before the filing of the petition); Re McKane, 152 Fed. 733, on subsequent appeal, 158 Fed. 647, 18 Am. Bankr. Rep. 594 (decree enforcing prior mortgage); Re Koslowski, 153 Fed. 823, 18 Am. Bankr. Rep. 723 (judgment confirming prior award of arbitrators, which by state law became a lien); Re Crafts-Riordon Shoe Co. 185 Fed. 931 (prior lien under an attachment); Re United States Graphite Co. 20 Am. Bankr. Rep. 573 (prior attachment lien perfected by judgment); Wakeman v. Throckmorton, 74 Conn. 616, 51 Atl. 555 (prior attachment lien perfected by judgment); National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131, 19 Am. Bankr. Rep. 654 (garnishment as ancillary to libel suit sued out prior to the four months' period); Snyder v. Smith, 185 Mass. 58, 69 N. E. 1089 (prior lien obtained by filing bill to reach and apply equitable assets of the bankrupt); Pepperdine v. Seymour, 100 Mo. App. 387, 73 S. W. 890 (prior lien of an attachment); Hurlbutt v. Brown, 72 N. H. 235, 55 Atl. 1046 (prior attachment lien); Doyle v. Heath, 22 R. I. 213, 47 Atl. 213, 4 Am. Bankr. Rep. 705 (prior lien created by filing creditors' bill). See also Reed v. Equitable Trust Co. 115 Ga. 780, 42 S. E. 102, 8 Am. Bankr. Rep. 242; Schoenthaler v. Rosskam, 107 Ill. App. 427; Taylor v. Taylor, 59 N. J. Eq. 86, 45 Atl. 440, and Jackson v. Valley Tie & Lumber Co. 108 Va. 714, 62 S. E. 964.

[27] Re Snell, 125 Fed. 154.

[28] Re Blair, 108 Fed. 529, 6 Am. Bankr. Rep. 206, 3 N. B. N. Rep. 777.

[29] Metcalf Bros. v. Barker, 187 U. S. 175, 47 L. ed. 127, 23 Sup. Ct. Rep. 67, 9 Am. Bankr. Rep. 36.

[30] Re Lesser, 108 Fed. 201, 3 N. B. N. Rep. 361 (provisional lien obtained by service of garnishment process, and which by state law could be rendered effective only by judgment); Re Johnson, 108 Fed. 373, 3 N. B. N. Rep. 815 (attachment on mesne process the lien of which became effective by judgment).

[31] Re Kavanaugh, 99 Fed. 928, 3 Am. Bankr. Rep. 832, 2 N. B. N. Rep. 528 (decree of state court setting aside fraudulent conveyance by debtor); Plaut v. Gorham Mfg. Co. 174 Fed. 852 (judgment dispossessing a bankrupt as tenant).

the bankruptcy law,[32] although a contrary conclusion has been reached.[33] So it has been said that § 67f avoids a judgment lien obtained against an insolvent within four months of the filing of the petition in bankruptcy, irrespective of whether or not the judgment is of a character which the bankrupt's discharge will release,[34] and that such section is sufficiently broad to apply to and avoid a judgment appointing a receiver for the bankrupt, where the proceeding in which it was rendered was practically an insolvency proceeding.[35]

There is also a diversity of opinion as to whether § 67f applies to judgments entered after the proceeding in bankruptcy was begun, it having been held both that § 67f has no application to judgments entered after the proceeding in bankruptcy has been begun,[36] and that such judgments are within the purview of that section.[37] In this connection it was said in Re Engle, 105 Fed. 893, 3 N. B. N. Rep. 444, that no provision of the bankruptcy act deals with judgments entered after the proceeding in bankruptcy has been begun, and that the reason for this apparent omission may be found in the fact that § 70 expressly provides that, after the trustee has been appointed, the title to the bankrupt's property shall vest in him as of the date of the adjudication, and that no permanent lien on such title can be acquired.

Under that part of clause f of § 67 which relates to bona fide purchasers, a lien obtained against a bankrupt by judgment taken within the four months' period is not annulled, so as to vacate the title of a bona fide purchaser for value who acquired the property without notice or reasonable cause for inquiry.[38]

Another line of cases, among which there has been a conflict of authority, are those which involve the question whether or not § 67f applies to both voluntary and involuntary bankruptcy proceedings. The theory that such subdivision applies to both classes of cases is now generally accepted,[39] the ground generally being that since § 1, clause 1, of the act declares that " 'a person against whom a petition has been filed' shall include a person who has filed a voluntary petition,"—subdivision f should be held applicable to both voluntary and involuntary proceedings. The adoption of the rule that § 67f applies to both voluntary and involuntary proceedings avoids the force which would otherwise attach to judgment liens obtained within four months of voluntary proceedings, in actions commenced prior to the four months' period, which are not affected by § 67c.[40] Earlier cases, however, hold that § 67f, because it sweeps away all judgment liens procured in proceedings against the insolvent within four months of the "filing of a petition in bankruptcy against him," is limited to in-

[32] McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433, 11 Am. Bankr. Rep. 54 (judgment upon a note waiving the homestead exemption upon lands set aside by the bankruptcy court as exempt); Clement v. King, 152 N. C. 456, 67 S. E. 1023 (judgment affecting property which by state law was subject to a tort claimant's judgment, but which was exempt from claims of other creditors).

[33] Re Forbes, 108 C. C. A. 191, 186 Fed. 79, holding that § 67f avoided the judgment lien, although the lien attached to exempt property.

[34] Re Benedict, 37 Misc. 230, 75 N. Y. Supp. 165.

[35] Mauran v. Crown Carpet Lining Co. 23 R. I. 324, 50 Atl. 331.

[36] Re Engle, 105 Fed. 893, 3 N. B. N. Rep. 444; Kinmouth v. Braeutigam, 65 N. J. L. 165, 46 Atl. 769, 4 Am. Bankr. Rep. 344.

[37] St. Cyr v. Daignault, 103 Fed. 854.

[38] State Bank v. Munroe, 109 Ill. App. 34; Farrell v. Lockett, 115 Tenn. 494, 91 S. W. 209.

[39] Re Richards, 37 C. C. A. 634, 96 Fed. 935, 3 Am. Bankr. Rep. 145, 2 N. B. N. Rep. 38, dismissing petition for review of judgment in 95 Fed. 258; Re Vaughan, 97 Fed. 560, 3 Am. Bankr. Rep. 362, 2 N. B. N. Rep. 101; Re Higgins, 97 Fed. 775, 3 Am. Bankr. Rep. 364, 2 N. B. N. Rep. 115; Re Dobson, 98 Fed. 86, 3 Am. Bankr. Rep. 420; Re Rhoads, 98 Fed. 399, 3 Am. Bankr. Rep. 380, 2 N. B. N. Rep. 301; Re Lesser, 100 Fed. 433, 3 Am. Bankr. Rep. 815, 2 N. B. N. Rep. 599; Re McCartney, 109 Fed. 621, 6 Am. Bankr. Rep. 367, 3 N. B. N. Rep. 1044; Re Tune, 115 Fed. 906; Re Beals, 116 Fed. 530; Re Green, 179 Fed. 870; Gabriel v. Tonner, 138 Cal. 63, 70 Pac. 1021; McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433, 11 Am. Bankr. Rep. 54; Mohr v. Mattox, 120 Ga. 962, 48 S. E. 410, 12 Am. Bankr. Rep. 330; Severin v. Robinson, 27 Ind. App. 55, 60 N. E. 966; Brown v. Case, 180 Mass. 45, 61 N. E. 279; Re Benedict, 37 Misc. 230, 75 N. Y. Supp. 165; National Bank & L. Co. v. Spencer, 53 App. Div. 547, 65 N. Y. Supp. 1001; Doyle v. Heath, 22 R. I. 213, 47 Atl. 213, 4 Am. Bankr. Rep. 705; Farrell v. Lockett, 115 Tenn. 494, 91 S. W. 209.

[40] Re Vaughan, 97 Fed. 560, 3 Am. Bankr. Rep. 362, 2 N. B. N. Rep. 101.

voluntary bankrupts, and therefore has no application to voluntary proceedings, notwithstanding the provisions of § 1, clause 1, and therefore a judgment or lien obtained in a proceeding within four months of the filing of a voluntary petition in bankruptcy would not be affected thereby.[41]

Under that part of § 67f which provides that all liens obtained against the estate of an insolvent within the four months' period "shall be deemed null and void in case he is adjudged a bankrupt, and that the property thereby affected shall be deemed wholly discharged and released therefrom," proceeds in the hands of a sheriff, and not paid over to the creditor, realized from a sale under execution, are released from the claim of the execution creditor, where the judgment, execution, and levy were all within four months prior to the filing of the petition in bankruptcy.[42]

And even where the proceeds of the sale have been paid over to the execution creditor, the bankruptcy court may compel their surrender unless held under an adverse claim at the time the petition was filed, as in such case the levy and sale as well as the judgment are avoided by § 67f; and such an adverse claim does not exist where the sale was made after the petition was filed, but before the adjudication, and the judgment creditor and the purchaser had notice of the pendency of the bankruptcy proceedings.[43] But keeping in mind that it is the lien that is declared void by virtue of § 67f, and not the transfer, it follows that when the proceeds are held adversely, as having been paid over prior to the filing of the petition in bankruptcy, § 67f does not affect the transaction, and the trustee cannot maintain summary proceedings in the bankruptcy court to compel the execution creditor to refund.[44] But, as before shown, the trustee in bankruptcy is not without remedy in such a case, even in the absence of fraud, as he may resort to plenary suit to recover the proceeds as a voidable preference under §§ 60a and 60b, provided the elements essential to recover under that section are present.

Questions with respect to the insolvency provision of § 67f have also arisen. Thus, notwithstanding insolvency of a debtor at the time of the entry of the judgment is an element essential to the avoidance thereof under § 67f, an adjudication of insolvency at that time, made in the bankruptcy proceedings, is conclusive against the judgment creditor.[45] So, an adjudication of bankruptcy is sufficient proof of the fact of insolvency within the language and intent of the act.[46]

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[41] Re DeLue, 91 Fed. 510, 1 Am. Bankr. Rep. 387; Re O'Connor, 95 Fed. 943, 2 N. B. N. Rep. 90.

[42] Clarke v. Larremore, 188 U. S. 486, 47 L. ed. 555, 23 Sup. Ct. Rep. 363, affirming 45 C. C. A. 113, 105 Fed. 897, 3 N. B. N. Rep. 556; Re Huffman, 1 Am. Bankr. Rep. 587; Re Kenney, 95 Fed. 427, on rehearing 97 Fed. 554, 2 N. B. N. Rep. 140, affirmed in 45 C. C. A. 113, 105 Fed. 897, 3 N. B. N. Rep. 556; Re Huffman, 1 Am. Bankr. Rep. 587; Re Kenney, 95 Fed. 427, on rehearing 97 Fed. 554, 2 N. B. N. Rep. 140, affirmed in 45 C. C. A. 113, 105 Fed. 897, 3 N. B. N. Rep. 556; Re Duguid, 100 Fed. 274, 2 N. B. N. Rep. 607; Mohr v. Mattox, 120 Ga. 962, 48 S. E. 410, 12 Am. Bankr. Rep. 330; Re Benedict, 37 Misc. 230, 75 N. Y. Supp. 165.

[43] Re Breslauer, 121 Fed. 910, 10 Am. Bankr. Rep. 33; Staunton v. Wooden, 102 C. C. A. 355, 179 Fed. 61; Grant v. National Bank, 197 Fed. 581.

[44] Re Bailey, 144 Fed. 214; Re Resnek, 167 Fed. 574; Nelson v. Svea Pub. Co. 178 Fed. 136; Re Weitzel, 191 Fed. 463; Greene v. Montana Brewing Co. 28 Mont. 380, 72 Pac. 751; Johnson v. Anderson, 70 Neb. 233, 97 N. W. 339; Starbuck v. Gebo, 48 Misc. 333, 96 N. Y. Supp. 781; Levor v. Seiter, 69 App. Div. 33, 74 N. Y. Supp. 499, 8 Am. Bankr. Rep. 459, reversing 34 Misc. 382, 69 N. Y. Supp. 987; Farrell v. Lockett, 115 Tenn. 494, 91 S. W. 209.

[45] DeGraff v. Lang, 92 App. Div. 564, 87 N. Y. Supp. 78.

[46] Levor v. Seiter, 34 Misc. 382, 69 N. Y. Supp. 987, reversed on other grounds in 69 App. Div. 33, 74 N. Y. Supp. 499, 8 Am. Bankr. Rep. 459.

The Downfall of a Great Cow Lawyer

BY S. F. DAVIS

of the Indianola (Miss.) Bar

SOME years ago, the city of Indianola, the county seat of Sunflower County, Mississippi, through her mayor and board of aldermen, enacted certain ordinances declaring, among other things, that from and after date, it should be unlawful for any horse, mule, cow, hog, or other live stock to run at large within the corporate limits of said town. Sometime thereafter, the board of supervisors of the county enacted a similar ordinance to apply to all that part of the county west of Sunflower river and south of the imaginary line running between beat three and beat four on the north. Now, live stock had been accustomed to roam at will over this territory since time when the memory of man runneth not to the contrary, and an attempt on the part of the authorities to enforce these newly made laws met with a stubborn resistance in many places. A great many people regarded these ordinances as unreasonable, unjust, and tyrannical, and as a bold attempt on the part of those in power to snatch from them the liberties guaranteed to them by the state and Federal Constitutions. In addition to the constitutional questions involved, there frequently arose a question of conflicting jurisdiction between the city and county courts. For instance, if a country cow should leave her happy rural home and wander aimlessly into the city limits without an escort, she had violated a city ordinance and was subject to being sold to the highest and best bidder for cash, to appease the majesty of the law which she had so ruthlessly trodden under foot. However, before this could be done, she must first be in the actual custody and control of the lawful and duly qualified municipal cow chaser, and be by him impounded and advertised for sale according to law, and it was not uncommon for a country cow, when accosted by this official, to make a bold dash for liberty and beat him to the corporate limits, where his authority automatically ceased. Her troubles did not necessarily end here, however, because she would then be liable to seizure by any citizen of that bailiwick, with or without a warrant, and haled before a justice of the peace on a charge of violating a county ordinance, and who was not bound to, and who frequently refused, to honor a requisition from the city mayor to surrender her to the city authorities until he had first got his cost and damage out of her owner.

Heretofore, ownership in all such live stock as were accustomed to roam at large was somewhat vague and indefinite. Every man who had cattle on the range generally estimated them to be about a certain number, and usually got that number if the supply held out. Under the new order of things, it was different. Men now began to seize the cattle supposed to belong to them, and to assert absolute and unqualified ownership over them. It frequently happened that two or more men would claim dominion over the same cow. All things combined were very conducive to much litigation during the first year these obnoxious laws were being forced upon these God-fearing, liberty-loving, free-born American citizens.

I had not been practising law very long then, and I began to make a specialty of these cow cases, and became so proficient in handling them that I became known, especially among the negroes, as the best "cow lawyer" in town, and had I confined my practice to the

negroes, and used negro witnesses, and them only, I might have lived and died the idol of their hearts, excelled in greatness only by Abraham Lincoln himself. But alas! "'tis human to err." One morning a neighbor of mine called on me and told me that, while making a short trip in the country, he had found a cow of his that had been gone from home for three years, and that she was in possession of a negro who had refused to deliver her to him on lawful demand, and that he wanted me to take the case, and that he was willing to spend any reasonable sum of money before he would let any d— negro beat him out of his property; that he knew it was his cow; that his mother-in-law had given her to him; that she was a cow that could be easily identified because she had a large scar on one hip where she had lain down in the fire when she was a calf; that on one occasion he had knocked one of her horns off; that on another occasion his bulldog had bitten about one half of her tail off; and that in addition to that, she was marked by a swallow fork in the right ear and a smooth crop and under bit in the left, and that there could be absolutely no mistake about it being his cow that he had seen, and that his wife and mother-in-law would testify to the same things he had told me.

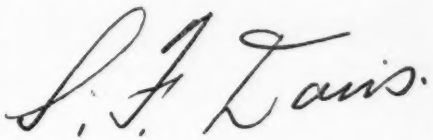
On his statement of the facts, it looked to me like a good case, and I foolishly accepted his statement of it at par. Had he been a negro, I would not have taken the case, delivered an opinion, or drawn a paper until I had first seen the cow. But in this case I had a writ of replevin issued and served on the defendant within less than two hours after I had been employed. Under the statute, the defendant had the right to give bond and retain possession of the cow until the case was disposed of, which he did.

About a week later the case came on for hearing before a justice of the peace. The defendant was present in his own proper person and represented by his attorney, and also had with him nine experienced and well-seasoned "cow witnesses." Court opened at 9 o'clock A. M., and I made a motion for an order requiring the defendant to produce the cow before the court for his inspection, which motion was resisted by the defendant, and the argument for and against it lasted until 12 o'clock, when the court overruled my motion and adjourned for dinner. After dinner we reassembled and the defendant called for a jury, which was allowed him. I opened my case by putting the plaintiff on the stand, and he made a good witness in his own behalf. I then put his wife on the stand and she contradicted him in several material parts of his testimony, and after conferring with his mother-in-law, I decided not to put her on the stand at all, and rested my case on the testimony of the plaintiff and his wife. The defendant then introduced witness after witness who swore positively that they were personally and intimately acquainted with the cow in question, and had known her from her birth to the present, and that she was unquestionably the property of the defendant. After the argument was concluded, the case was submitted to the jury, who were out the remainder of the day, and then reported to the court that they were unable to agree, and were discharged and a mistrial entered.

After three mistrials before the justice of the peace, a fourth trial resulted in a verdict for the defendant, and we appealed to the circuit court.

When the case came on for hearing in the circuit court, I renewed my motion for an order requiring the defendant to produce the cow at the courthouse for inspection by the jury, which motion, strange to say, was again resisted by the defendant, but sustained by the court, and the cow ordered produced. As soon as I saw the cow, I also saw my fatal mistake, and was in hopes that she would break loose and run off before the jury saw her, but she showed no inclination to do so, however, but on the contrary seemed to like her surroundings, and seemed especially to like to stand at the front gate where everyone either entering or leaving the court room would have to pass by her. She in no way resembled the cow described in my pleading, except she was minus one horn and about two thirds of her tail. According to my client's own statement, his cow

was not less than fifteen years old, and the cow that I had fought so hard to have brought into court as "Exhibit A" to his testimony, proved to be a right young heifer, not over three years old at the most. This cow was on exhibition for three days in the courthouse yard, waiting for our case to be reached on the docket, when on the fourth day, a third party came in and identified her as his cow, filed a claimant's affidavit, which was not resisted by the original defendant, and who recovered a judgment against my client for the cow, and all costs, which amounted to something over $150, and from that day to this, I have never had any more confidence in myself as a "cow lawyer," and my client has become a confirmed anarchist, and has repeatedly told me that he has never had any respect for or confidence in the courts since they beat him out of his cow.



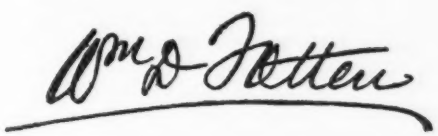
The Prima Facie Case.

How pleasing is the prima facie case
  Bearing the stamp of merit on its face
And when a lawyer shows it at its best
  Well satisfied, he proudly says *"we rest."*

But like the glassy face of smoothest ice
  Beneath the smiles of spring's first sunny skies
Or like the ripest fruit of fairest skin
  'Tis often poor and treacherous within.

Oft times its fair career remains uncurbed
  The joys of its possessor undisturbed
And yet in sorrow oft it comes to pass
  It falls like a balloon devoid of gas.

Fair harbinger of victory begun
  'Tis not uncanny nor a thing to shun
And in our hearts it holds an honored place
  Our dear illusive prima facie case.



Editorial Comment

The associates and co-partners of our loss.—Milton.

Case and Comment
THE LAWYERS MAGAZINE
Vol. 20 FEBRUARY No. 9

Established 1894.

¶ Editor, Asa W. Russell; Business Manager, B. R. Briggs; Advertising Manager, G. B. Brewer.

¶ Office and plant: Aqueduct Building, Rochester, New York.

¶ TERMS:—Subscription price $1.50 a year. Canada, $1.75; Foreign, $2.00, 15 cents a copy. Advertising rates on application. Forms close 10th of Month preceding date of issue.

¶ EDITORIAL POLICY:—It is the purpose of CASE AND COMMENT to voice the highest legal and ethical conceptions of the times; to act as a vehicle for the dissemination and interchange of the best thought of the members of the legal profession; to be both helpful and entertaining,—serving the attorney both in his work and in his hours of relaxation.

¶ Published monthly, by The Lawyers Co-operative Publishing Company. President, W. B. Hale; Vice-President, I. B. Bryan; Secretary, B. A. Rich; Treasurer, W. H. Briggs.

Double Proof against Firm and Individual Estates in Bankruptcy.

GIVEN a partnership and its members in bankruptcy, may a joint and several creditor have recourse against both the firm and the individual estates in the first instance? For the trifle of two hundred years, this question has received the attention of bankruptcy courts, and appears not to be finally settled, in this country at least. It has been said that the first decision on the question was rendered in 1735 in the English case of Ex parte Rowlandson, 3 P. Wms. 405. Invoking the doctrine that if a person to whom others are jointly and severally bound sues the obligors severally, he cannot thereafter sue them jointly,—the court held in that case that the obligee in a joint and several partnership bond, having received a dividend under the joint commission, was not entitled to dividends under the separate commissions, the individual estates being insufficient to pay the respective individual debts. But it seems that the holding would have been otherwise had the creditor held the separate and distinct obligation of one or more of the partners for the same debt, as the court took occasion to distinguish an earlier decision, apparently unreported, in which the creditor was allowed to realize under both the joint and several commissions, where he held the individual bond of a partner for the debt.

Even where the individual estate was more than sufficient to pay the individual debts, there was a disinclination to permit the joint and several creditors, in the absence of a distinct individual obligation, to receive a dividend on a parity with the separate creditors; for it was declared that this would be an injustice to the joint creditors (Ex parte Banks [1740] 1 Atk. 106; Ex parte Bond [1745] 1 Atk. 99), inasmuch as the latter were entitled to come in on an equal footing with him in resorting to the surplus of the separate estate (Ex parte Bevan [1804] 10 Ves. Jr. 107). It is interesting to note that while Lord Eldon intimated in the latter case that he thought that a creditor having a joint and several security ought to have recourse against both estates, he said that the contrary rule was settled upon reasons not very intelligible, and he yielded to precedent.

The distinction between a "joint or several" obligation and "joint and several" obligations was applied in other English cases, which are merely cumulative, excepting Re Parker (1887) L. R.

19 Q. B. Div. 84, which allowed double proof under the provision of the English bankruptcy act, which provided that if a debtor was liable in respect of distinct contracts as a sole contractor, and also as a member of a firm, the fact that the sole contractor was also a joint contractor should not prevent proof in respect of the contracts against the parties respectively liable on the contract. But even in this case the court took pains to point out that as the claim was for money misappropriated by a firm, a partner of which was a trustee of the claimant, there was a joint obligation to restore the money, and a distinct liability on the part of the partner, growing out of his duty as trustee.

The rule of the early English cases did not meet with approval in this country, and the courts were disposed to give the holder of a joint and several obligation recourse against both estates. Indeed, the courts went out of their way expressly to repudiate the distinction of the English cases between "joint or several" and "joint and several" obligations, notwithstanding no necessity for passing upon the correctness of the distinction existed, for the reason that the cases in which it was repudiated involved a joint obligation of the firm and a separate, distinct obligation on the part of the partner. This is true of Re Farnum, Fed. Cas. No. 4,674, decided in 1843, and Emery v. Canal Nat. Bank, 3 Cliff. 507, Fed. Cas. No. 4,446, 7 Nat. Bankr. Reg. 217, both of which involve commercial paper signed by the firm as such and indorsed by an individual partner; and also of Re Baxter, Fed. Cas. No. 1,119, 18 Nat. Bankr. Reg. 62, which, on the authority of the Emery Case, allowed recourse against both estates where the firm was sought to be held liable as general business agent of the claimant, and the liability of the individual partner was predicated of his breach of duty as treasurer of the claimant. It is clear that since these cases involve joint and several obligations, any expression of opinion in them with respect to a joint or several obligation is necessarily *dictum*.

The foregoing American cases were decided under the Federal bankruptcy acts of 1841 and 1867, which made the partnership estate primarily liable for the firm debts and the individual estate primarily liable for the separate debts, and provided that the surplus if any of either estate should, if necessary, be added to the assets of the other estate for the purpose of making up the deficiency of the latter. The other cases decided under these acts likewise involved "joint and several" obligations. For instance, double proof was allowed in Re Bradley, 2 Biss. 515, Fed. Cas. No. 1,772, involving a note in which a firm was bound as maker and one of the partners as indorser; and Re Howard, Fed. Cas. No. 6,750, 4 Nat. Bankr. Reg. 571, involving a note which bore separate indorsements by the firm and by a partner.

Though employing different language, the provision in the bankruptcy act of 1898 is in effect similar to those of 1841 and 1867. In one of the earlier cases decided under this act, it is pointed out that the provision referred to makes a sharp distinction between partnership debts and individual debts in respect of participation in the partnership and individual assets, and declares that the test is whether the debts are at the time of the adjudication, as between the individual and the firm, the separate debts of the individual, or the joint debts of the firm, and not whether the individual is anyhow liable for the debts. Lamoille County Nat. Bank v. Stevens, 107 Fed. 245, 6 Am. Bankr. Rep. 164. While not involving the question of double proof, the case is interesting, since, although it involved a note given for a firm debt, and bearing the indorsement of a member of the partnership, it held that, inasmuch as it was a firm debt, it could not be proved against the individual estate in any event.

However, it was held in Buckingham v. First Nat. Bank, 65 C. C. A. 498, 131 Fed. 192, 12 Am. Bankr. Rep. 465, that a note signed by a firm and indorsed by a member thereof was a claim against the individual estate of the indorser, and that the holder of the note could claim payment thereof out of the individual estate in preference to the claims of the firm creditors.

In what appears to be the first case

involving double proof under this act, it is declared that joint and several notes given by partners for partnership liabilities are none the less partnership debts because the partners are also individually liable, and that since, by the terms of the bankruptcy act of 1898, no part of the separate property is to go for partnership debts till the separate creditors are fully paid, there can be no individual assets of the partner in which such partnership creditors can participate. Re Mosier, 112 Fed. 138, 7 Am. Bankr. Rep. 268. For all that appears in this case the notes involved contained the name of the firm and also of the individual partners as makers, instead of bearing the signature of a partner as indorser, as in Buckingham v. First Nat. Bank, supra, and this difference between the two cases leaves room to distinguish them upon the ground referred to in the Rowlandson Case.

On the other hand, it was held in another case that the holder of a note signed in the name of the firm and by the individual partners, and given for money used in the partnership business, could, after proof of the claim against, and receipt of a dividend from, the firm estate, prove his claim for the balance against the individual estate, Re McCoy, 80 C. C. A. 60, 150 Fed. 106, 17 Am. Bankr. Rep. 760.

Another interesting phase of this question is presented in the more recent case of Reynolds v. New York Trust Co. 110 C. C. A. 409, 188 Fed. 611, 39 L.R.A. (N.S.) 391, holding that a person whose bonds have been converted and consumed by a brokerage firm cannot, upon the theory that the tort is both joint and several and that, therefore, he may proceed jointly and severally in contract, prove his claim in bankruptcy proceedings both against the estate of the firm and that of an individual partner who is not shown to have participated in the conversion, nor benefited thereby. In this case it seems to be assumed that there can be double proof in the case of a joint and several obligation, and the conclusion in the case is based upon the ground that there was no joint and several obligation. A contrary conclusion was reached in Re Coe, 106 C. C. A. 181, 183 Fed. 745, but this case is distinguishable since the joint liability of the firm was predicated upon its liability on certain firm acceptances, and the claim against the individual partner was based upon his fraudulent conversion of the proceeds of the bonds.

A survey of the cases leaves it certain that, if the creditor has an independent obligation of the partner, he is entitled to resort to both estates. But where the debt is joint and several, and the individual is charged with no independent and distinct obligation, there is no certainty as to where the courts of this country stand. It is true that some of the earlier Federal courts voiced an inclination to repudiate the distinction invoked by the English courts, and to permit the holder of a joint and several obligation to have recourse against both estates; but the fact remains that one case at least (Re Mosier) flies in the face of such avowed inclination, and also that all of the cases which have permitted a resort to both estates involve an independent obligation on the part of the individual partner. As has been said, the question has been before the courts for nearly two hundred years. There is nothing which positively indicates how it may be settled. Time alone will tell.

L. A. WILDER.

Professional Ethics.

AMONG the interesting questions recently submitted to and answered by the committee on Professional Ethics of the New York County Lawyers' Association are the following:

Question.

Within twenty days after defendant had served his answer, plaintiff moved for judgment on the pleadings, and the motion was submitted on written briefs, and the court took the same under consideration. Before the court had decided the motion, defendant served his amended answer, and, on the last day for such service notified the court of such action, and claimed that his amended answer superseded the pending undecided motion, and the court, so holding, declined to decide the motion.

Subsequently, plaintiff moved to amend his complaint, and, in opposition to that motion, defendant's attorney submitted his affidavit, wherein he said:

"He (plaintiff) also omitted to advise the court in his affidavit that upon the pleading he now seeks to amend he unsuccessfully moved for judgment on the pleadings before Justice——, over four months ago."

Was not this sworn statement untrue and improper?

May it not be characterized as an attempt to deceive the court?

Answer.

In the opinion of the committee, the statement appears to be true, but not full and complete. The affiant should have fully apprised the court of the facts; his failure to do so was apt to mislead the court, and all statements likely to mislead the court, whether through design or inadvertence, should be carefully avoided.

Question.

About twenty years ago A was convicted of a felony. After serving about eight years of his sentence, he was pardoned and restored to full civil rights. Immediately after his pardon he set up in business and has continued in that business at the same address for about ten years. He is peaceful, respectable, and well thought of. Recently he was compelled to bring two suits against B, both involving questions of fact. B's counsel knew of A's conviction, his pardon, his restoration to full civil rights, and his subsequent clean, private, and successful business life. Yet on the occasion of each trial (one before a jury) B's counsel interrogated A concerning his conviction of a crime, the sentence imposed, the time served, the charge, and even made certain details of or consequences of the crime a part of his questions. Do you consider this conduct and these questions of B's counsel proper and ethical?

Answer.

The committee considers that wanton, unnecessary, or unreasonable inquiry or comment respecting the discreditable past history of a witness or party, is unethical and improper professional conduct; it cannot, however, assume to say that such inquiry or comment, whether admissible or not under the law of evidence, was, in the case suggested, wanton, unnecessary, or unreasonable.

Question.

An attorney, in the course of representing a client in certain specific matters, is informed by the client that certain real estate is held by a third person for him (the client) in the third person's name, the property having been transferred by the client to the name of the third person for the purpose of avoiding a judgment, that deed being placed on record, the client, however, having taken back a deed from the third person to himself, this deed remaining off record and in the client's possession. The information is given to the attorney in the course of a general discussion, and entirely disconnected from any matter in which counsel's service or advice had been given.

The client afterward fails to pay the attorney for the services rendered. Suit follows and judgment is recovered by the attorney. Execution is issued and returned unsatisfied. It appears then that the collection of the judgment, and therefore compensation to the attorney for his services, will be impossible unless he is permitted to proceed after the real estate in question and permitted to show that the same really belongs to the debtor client.

1. Would it be improper for the attorney, in enforcing his claim for compensation against his client by legal process, to attempt to reach his client's interest in the real property, thus necessarily disclosing in the proceedings, and utilizing for his own benefit, his client's statement to him, collection otherwise being impossible?

2. In legal proceedings for the enforcement of the claim, can the attorney properly call upon another attorney, who prepared and took the acknowledgments to the deeds of conveyance and reconveyance, to testify respecting the transaction?

Answer.

In the opinion of the committee, to preserve inviolate his client's confidence is

a fundamental ethical rule of our profession, binding upon every lawyer. This rule is now embodied in our New York Code of Civil Procedure, § 835, and has been rigidly applied, but with certain apparent exceptions. With such possible exceptions in mind, the majority of the committee is still of opinion that the attorney should not, in the case submitted, utilize for his own benefit the confidential statements of his client; and it would therefore answer Query No. 1 in the affirmative, and Query No. 2 in the negative.

Question.

In an action which, among other things, involved the validity of a real property corporation mortgage, in which plaintiff had an interest, a motion for a receiver of the property was made by plaintiff, and in opposition the attorney and president of the corporation submitted his affidavit, wherein he stated that he, in behalf of the company, had offered to pay plaintiff the interest due him on his share of the mortgage, if plaintiff would sign a suitable paper protecting the company against any loss attending such payment, and that such offer was still open to plaintiff.

Subsequently plaintiff asked said attorney and president to keep his promise and pay the interest, preferring to sign any such reasonable paper as he might exact. Whereupon said attorney and president declined to pay such interest until he could determine whether or not the company had some counterclaim against plaintiff which could be set up against the interest, and asserted that if he determined there was such counterclaim, then such interest would not be paid.

Was not such refusal to fulfil such offer and promise, improper and unprofessional?

Does not such offer and refusal amount to a deception of the court?

Answer.

The committee does not consider that it is unprofessional to withdraw an unaccepted offer, nor does it consider that its withdrawal, as stated, was a deception.

Question.

An inquirer has handed the committee a series of advertisements appearing in a daily newspaper in the forms hereto annexed, and has asked an expression of the opinion of the committee upon the propriety of such advertising by lawyers.

Lawyers.

A.—Able lawyer, specialist family troubles, private matters, etc.; furnishes reliable advice; all cases handled; satisfaction guaranteed; quick results; domestic relation laws of all states explained. Call, write, LAWYER.....

A.—A.—A.—A.—ACCIDENTS, estates, family troubles; cases handled successfully; satisfaction guaranteed; strictly confidential; matters quickly settled; no fee unless successful. Call, write, 'phone.....LAWYER.....

ACCIDENT CASES, DOMESTIC TROUBLES and all legal difficulties STRENUOUSLY handled to YOUR SATISFACTION, LAWYER.....
Evenings till 9.

FOR results see me; reliable, experienced; successful; accident, family troubles, all cases, consultation free. Call or write. LAWYER.

LAWYER (American), highest standing; consultation free; notary public. .....Sundays, evenings till 9.

Answer.

In the opinion of the committee, all of the advertisements appended to Question No. 45 are improper.

"The ethics of the legal profession forbid that a lawyer should advertise his talents or his skill as a shopkeeper advertises his wares."

(People v. McCabe, 19 L.R.A. 231.)

The first four are also objectionable because they seem to indicate a willingness to take all cases, irrespective of the merit of the cause; and the first three have the demerit of containing an impossible and therefore false and misleading guaranty of satisfaction.

Among the New Decisions

The cold neutrality of an impartial judge.—Edmund Burke.

Attorney — disbarment — taking usury. That an attorney cannot be disbarred for lending money on usury, if the taking of usury is not an offense against the law, is held in People ex rel. Chicago Bar Asso. v. Wheeler, 259 Ill. 99, 102 N. E. 188, 45 L.R.A.(N.S.) 1202, which seems to be a case of first impression.

Automobile — unauthorized use — liability of owner. That the owner of an automobile cannot, under the due process and equal protection clauses of the Constitution, be made liable for injury to strangers, through its use by persons who have taken it without his knowledge or permission, although their acts do not constitute larceny, is held in the Michigan case of Daugherty v. Thomas, 140 N. W. 615, annotated in 45 L.R.A. (N.S.) 699.

This appears to have been the first case squarely passing upon the constitutionality of a statute which undertakes to render the owner of an automobile absolutely liable for injuries caused thereby, irrespective of negligence on his own part or on the part of anyone for whose conduct he is responsible.

Bank — insolvency — collection of check — knowledge of cashier. While there are doubtless many cases in which knowledge by the officers of the bank of its insolvency has been charged to it, there are few cases presenting the distinctive question as to whether the bank is chargeable with the knowledge of a particular officer or officers of the insolvency of the bank brought about by his own misconduct, and concealed from the other officers.

The Virginia case of Pennington v. Third Nat. Bank, 77 S. E. 455, annotated in 45 L.R.A.(N.S.) 781, holds that a bank which, through its cashier, receives for collection a check, is charged with his knowledge of its insolvency, although it occurred through his own defalcation, so as to render the proceeds of the collection a trust fund which may be followed by the owner of the check.

Bankruptcy — payment of note — recovery of accommodation indorser. The decisions uniformly hold that the payment of a debt by a bankrupt may, the other elements of preference being present, operate as a preference to an indorser or a surety. As has been said by the United States Supreme Court in National Bank v. National Herkimer County Bank, 225 U. S. 178, 56 L. ed. 1042, 32 Sup. Ct. Rep. 633, "To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it."

The recent Connecticut case of Platt

v. Ives, 86 Conn. 690, 86 Atl. 579, holds that the payment by the maker of a note to the holder in exoneration of an accommodation indorser, within four months of bankruptcy, is a preference to the indorser which may be recovered by the trustee under § 60, subdivision a and b, of the bankruptcy act.

This decision is accompanied in 45 L.R.A.(N.S.) 1068, by the later cases on the subject, the earlier adjudications having been presented in 18 L.R.A. (N.S.) 660.

Bankruptcy — preference — set-off by bank. Several recent decisions in the United States Supreme Court involve the question of the right of a bank to set off a claim against the bankrupt's deposit. Thus, in Continental & C. Trust & Sav. Bank v. Chicago Title & T. Co. 229 U. S. 435, 57 L. ed. 1268, 33 Sup. Ct. Rep. 829, it was held that a bank which had issued margin certificates to a depositor, evidencing deposits made by him to secure the performance of his dealings on the Chicago board of trade, did not receive a preference forbidden by the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), §§ 60a and b, where such depositor, being in financial difficulties, afterwards transferred his open trades to a corporation which agreed to and did carry them out, substituting its own securities for his, and turning over the margin certificates thus secured to the bank, which, with reasonable cause to believe the depositor insolvent, and within four months of the proceedings in bankruptcy against him, applied the amount of the deposits to his indebtedness to the bank. The court also held that a balance left in a deposit, subject to check for specific purposes, may be applied by the bank to the payment of the depositor's indebtedness to it without violating the prohibitions of the bankrupt act of July 1, 1898, §§ 60a and b, against preferential transfers, although the transaction was within four months of the bankruptcy proceedings against the depositor, and the bank at the time had reasonable cause to believe him insolvent.

And in Studley v. Boylston Nat. Bank, 229 U. S. 523, 57 L. ed. 1313, 33 Sup. Ct. Rep. 806, it was held that the enforcement by a bank of its lien or right of set-off by applying deposits, honestly made in due course of business, and without intent to prefer the bank, to the payment of the depositor's notes in the bank's favor as they matured, does not, though within four months of the bankruptcy proceedings against such depositor, constitute a preference forbidden by the act of July 1, 1898, there being nothing in § 68a of that act which prevents the parties from voluntarily doing before the petition is filed what the section itself requires to be done after the proceedings in bankruptcy are instituted.

But in National City Bank v. Hotchkiss, Adv. S. U. S. 1913, p. 20, the same court held that a bank which credits to the general deposit account of a firm of stock brokers the amount of a clearance loan made with the understanding that it was to be used solely to clear securities, and was to be repaid later in the day, and which does not require the securities released to be kept separate, or that any separate account be kept of money received from deliveries of stock so released, obtains a preference voidable by the brokers' trustee in bankruptcy, where, after the brokers' suspension, it demanded and received from them securities without regard to their source, to make good the brokers' obligation to the bank, with notice in terms that it was thereby receiving a preference, and that the brokers were going into bankruptcy.

And in Mechanics' & M. Nat. Bank v. Ernst, Adv. S. U. S. 1913, p. 22, it was held that deposits made by an insolvent customer after the bank cashier has forbidden the payment of checks against the deposit account, and but a few hours before an involuntary petition in bankruptcy was filed against the customer, constitute a voidable preference, and cannot be allowed to the bank by way of set-off against the customer's indebtedness to the bank.

Other cases on this question of set-off by bank against bankrupt's deposit as a preference within the bankruptcy law are discussed in a note to Booth v. Prete, 20 L.R.A.(N.S.) 863.

Bankruptcy — assets — bailment or sale — validity as to creditors. The Supreme Court of the United States in Ludvigh v. American Woolen Co. Adv. S. U. S. 1913, p. 161, held that an agreement between woolen manufacturers and a corporation formed to represent a firm of dealers in woolens must be construed to amount to a bailment in the nature of a consignment arrangement, with the net proceeds of sale to be accounted for to the consignor, and with the right to return the unsold goods, which agreement, in the absence of fraud, is good as against creditors in the event of the bankruptcy of the firm, where, after providing for the delivery to the corporation of woolens, the title to which is to remain in the manufacturers until sold, such agreement binds the corporation to sell the same and to collect and pay over to the woolen company the proceeds, less the difference between invoice and selling price, to guarantee the payment of bills and accounts, to pay the invoice price of any goods not accounted for under the above provision, and to return to the possession of the manufacturers immediately upon the termination of the agreement all merchandise, the possession of which is held by the corporation under such agreement.

Bankruptcy — limitation of actions — suit to set aside conveyance by bankrupt — fraud. In Kinder v. Scharff, Adv. S. U. S. 1913, p. 164, the Supreme Court of the United States held that the two years' limitation after the closing of the estate, prescribed by the bankrupt act of July 1, 1898 (30 Stat. at L. 546, chap. 541, U. S. Comp. Stat. 1901, p. 3421), § 11d, for suits by or against trustees in bankruptcy, bars an action by a former trustee to set aside a conveyance made by the bankrupt as in fraud of creditors, brought after he had had the bankruptcy proceedings reopened for that purpose, on the ground that he had just discovered the facts, where, during the pendency of the original proceedings, the trustee suspected the alleged fraud and made some inquiries, but dropped the matter because he thought it would not pay to go further.

Bankruptcy — voidable transfers — assignments of accounts. The Supreme Court of the United States in Greey v. Dockendorf, Adv. S. U. S. 1913, p. 166, held that successive assignments of accounts by way of security, in pursuance of a contract under which advances were made to enable the assignor to get the goods, on the faith of the undertaking that the accounts should be assigned, made without knowledge of the assignor's insolvency, and without conscious fraudulent intent, were not bad as against the bankrupt assignor's general creditors without lien because the contract embraced all accounts, and the lien thereunder was a secret one.

Case — threat over telephone — assault. A novel question was before the court in the Iowa case of Kramer v. Ricksmeier, 139 N. W. 1091, 45 L.R.A.(N.S.) 928, which holds that no action lies for causing the relapse of a convalescent woman by calling her over the telephone during her husband's known absence, and with threatening and abusive language ordering her to take charge of her husband's cattle, which had escaped from their inclosure, under penalty of a threatened visit to her home to avenge the speaker of the assumed wrong inflicted by failure to keep the cattle inclosed.

This case is also authority for the proposition that abusing and threatening a woman over a telephone is not an assault.

Charity — beneficiary to enforce — competency. There seems to have been no direct authority upon the question as to who may enforce a trust for masses, prior to the Indiana case of Ackerman v. Fichter, 101 N. E. 493, annotated in 46 L.R.A.(N.S.) 221, which holds that since a trust for masses for the repose of all poor souls is for the benefit of both living and dead, living persons have an interest in its enforcement both for themselves and as kindred of the dead, so that the trust will not fail for lack of beneficiaries competent to enforce or invoke its enforcement.

Chattel mortgage — building — desk as appurtenance. A roller-top desk in the office of an elevator is held in the South

Dakota case of Dixson v. Ladd, 142 N. W. 259, not covered by chattel mortgage on the elevator, shutes, bins, machinery, and other appurtenances thereto belonging.

The decisions specifying what articles are included in such general terms as appurtenances, fixtures, and the like, employed in a chattel mortgage, are appended to the report of the foregoing case in 46 L.R.A.(N.S.) 206.

Contract — sale of unlawful business — enforceability. There seem to be few cases dealing with the question as to the effect of conducting a business in violation of law, upon a contract for the sale of the business itself.

It is held in Swisher v. Dunn, 89 Kan. 412, 131 Pac. 571, annotated in 45 L.R.A.(N.S.) 810, that a contract for the sale of a drug store, including the stock and business, is not rendered unenforceable by the fact that the business had at all times been conducted in violation of the law requiring the owner or some employee to be a pharmacist or assistant pharmacist.

Contract — validity — limitation of labor employment. A contract by an employer to employ union labor exclusively is valid, at least where the restraint imposed is not unreasonable in view of the surrounding facts and circumstances. It would seem, however, that a contract of this character is invalid if unreasonably in restraint of trade, as where it includes practically all the manufacturing industries of a locality.

Thus, it is held in Connors v. Connolly, 86 Conn. 641, 86 Atl. 600, that an agreement between employers and a labor union that none but members of the union shall be employed is against public policy where it takes in an entire industry of considerable proportions in a community, so that it will operate generally in that community to prevent or seriously deter craftsmen from working at their craft, or workingmen entering employment under favorable conditions, without joining the union.

Nor does the fact that an agreement between employers and a labor union, that none but union labor shall be employed, has on the whole been beneficial to the community, establish its conformance with public policy.

The cases on validity of contract to employ union labor only are appended to the report of this case in 45 L.R.A. (N.S.) 564.

Death — injury before birth — death afterwards — action. The parents of a child which dies soon after birth because of injuries negligently inflicted upon it before that event are held in Buel v. United R. Co. 248 Mo. 126, 154 S. W. 71, annotated in 45 L.R.A.(N.S.) 625, not entitled to maintain an action against the negligent person for damages, under a statute providing that whenever a person shall die from any injury occasioned by negligence, the negligent person shall pay a penalty to the father and mother, if deceased is a minor unmarried.

The few cases which have passed upon the question are in unison in denying the child, or its personal representative, the right to recover for injuries negligently inflicted upon it while *en ventre sa mere*. And, perhaps, it may be stated as a general rule supported by practically all of the cases, that in the absence of statute a prenatal injury to a child is not a ground of action.

Deed — condition — double house. A condition in the conveyance of lots on a tract of residence property, that no building other than a dwelling house shall be erected on a lot, is held in the Michigan case of Schadt v. Brill, 139 N. W. 878, annotated in 45 L.R.A.(N.S.) 726, to prohibit the construction of a double house on the lot, although it is under one roof with a single front entrance.

Drugs — sale by physician. The right of a physician to sell drugs without a prescription was considered in the Indiana case of Niswonger v. State, 102 N. E. 135, annotated in 46 L.R.A.(N.S.) 1, which holds that a sale of cocaine by a duly licensed physician without a written prescription violates a statute making it unlawful for any person to sell cocaine except upon a written prescription of a duly licensed physician.

Election — bonds — requisite majority — total vote — defective balance. There is some conflict among the cases as to whether rejected ballots should be counted in determining the total vote cast.

That ballots rejected as unintelligible or illegal should not be counted in determining the total vote cast upon a proposition to issue bonds, under a statute requiring its adoption by three fifths of the qualified voters of the town or city voting at the election, is held in State ex rel. Short v. Clausen, 72 Wash. 409, 130 Pac. 479, annotated in 45 L.R.A.(N.S.) 714.

Eminent domain — railroad — right to excavated material. So far as it is possible to state a rule applicable to all kinds of material found upon a railroad right of way, it seems to be settled that a railroad company is entitled to remove any material when the safety or convenience of the road requires such removal, and also is entitled to appropriate so much of the material to its own use as is reasonably necessary for the construction and maintenance of its road, at least for use on that part of the road; but it has no right to sell or give away such material to another person.

The condemnation of a right of way for railway purposes is held in the Indiana case of Cleveland, C. C. & St. L. R. Co. v. Hadley, 101 N. E. 473, to include the right to use elsewhere so much of the earth, rock, and gravel as is necessary or convenient to remove in constructing or repairing the roadbed.

This decision is accompanied in 45 L.R.A.(N.S.) 796, by a note on the right of a railroad company to material or mineral within its right of way.

Evidence — demonstrative — comparison of typewriting. Upon the question of forgery of a typewritten will the work on which presents peculiar mechanical characteristics, work of a typewriting machine possessing the same characteristics is held in People v. Storrs, 207 N. Y. 147, 100 N. E. 730, to be admissible in evidence to establish the identity of the machines which produced the will and examples of work so introduced.

The authorities treating of comparison of typewriting and expert evidence concerning it, are gathered in the note accompanying the foregoing decision in 45 L.R.A.(N.S.) 860.

Exemptions — office safe. That a safe used by a physician in his business for the keeping of his instruments and books and medicines is exempt from execution is held in the Iowa case of Sterman v. Hann, 141 N. W. 934, annotated in 46 L.R.A.(N.S.) 287.

Fraud — inducing marriage — representations as to property. An action lies for fraudulent misrepresentations inducing marriage to a third person, the amount of damages recoverable depending on the circumstances of the particular case.

Thus, it is held in the Iowa case of Beach v. Beach, 141 N. W. 921, annotated in 46 L.R.A.(N.S.) 98, that a person who, to induce a marriage with her son, falsely represents that the son is the owner of certain specified real estate, is liable in damages to a woman who enters into a marriage with the son in reliance on the representations.

Health — violation of quarantine ordinance. That a mother who knowingly permits her children to violate a valid quarantine order may be subject to the statutory penalty for violating quarantine is held in State v. Racskowski, 86 Conn. 677, 86 Atl. 606, 45 L.R.A.(N.S.) 580, which further decides that merely showing that children affected with a contagious disease were abroad in violation of a quarantine order does not warrant conviction of their mother for permitting such violation, since there is no presumption that they acted with her knowledge or consent.

This seems to be a case of first impression in the United States upon this question.

Homicide — mutual combat — murder. The general rule is that a party voluntarily and willingly entering into a mutual combat cannot justify a resulting homicide unless he does something, as, for example, withdrawing from the combat, which would relieve him from his original wrong in entering it; the reason

being that one cannot take human life upon a necessity which he wrongfully assisted to create.

So, it is held in Ex parte Colby, 6 Okla. Crim. Rep. 187, 124 Pac. 635, that where persons armed with deadly weapons voluntarily and willingly enter into a combat, knowing or having reason to believe that such conflict will result in the infliction of serious bodily injury or in the death of one or the other of said parties, and one of said parties is killed in such conflict, the party doing the killing is guilty of murder, and is not entitled to bail.

This decision is accompanied in 45 L.R.A.(N.S.) 646, by the cases on homicide in mutual combat voluntarily and willingly entered into.

Homicide — self-defense — paramour of wife. That one is not deprived of the right of self-defense when attacked by another, by the fact that he has enticed the latter's wife from her home for illicit purposes is held in the Missouri case of State v. Larkin, 250 Mo. 218, 157 S. W. 600, annotated in 46 L.R.A.(N.S.) 13.

Insurance — second fire — damages — vacancy of property. That nominal damages only can be recovered under an insurance policy, for a second fire, if the first one destroyed the building so that it was not able to be occupied, is determined in the New Jersey case of Kupfersmith v. Delaware Ins. Co. 86 Atl. 399, annotated in 45 L.R.A.(N.S.) 847, which further holds that a provision in a fire insurance policy avoiding it in case the property becomes vacant is not affected by another clause giving the insurer an option to repair in case of injury to the property, so as to preserve the insurance in force in case the property is vacated after injury by fire, and permit recovery for a second loss which occurs before the option is exercised.

Intoxicating liquors — recovery of unearned fee. The authorities uniformly sustain the position taken in the case above reported that, in the absence of statutory provision therefor, no recovery of any part of a liquor license fee may be had where the license has been revoked for misconduct of the licensee.

Thus it is held in Roberts v. Boise City, 23 Idaho, 716, 132 Pac. 306, annotated in 45 L.R.A.(N.S.) 593, that a liquor dealer cannot recover the unearned portion of his license fee when his license is summarily revoked by the municipal authorities because he was not a fit person to conduct the business.

Libel — mental distress — illness of wife — action by husband. That a man may recover for loss of services of his wife due to sickness resulting from mental distress caused by the wilful and malicious publication concerning her of defamatory words actionable *per se*, is held in Garrison v. Sun Printing & Pub. Asso. 207 N. Y. 1, 100 N. E. 430, annotated in 45 L.R.A.(N.S.) 766, on the question of the libel or slander of one person as a ground of action by another.

Lottery — loss of ticket — right against finder. The owner of a lucky ticket in a series by which a merchant is to give a prize as a stimulation to trade, who loses it, is held in the South Carolina case of Rountree v. Ingle, 77 S. E. 931, annotated in 45 L.R.A.(N.S.) 776, to have no right of recovery against the finder, to whom the prize is awarded upon presentation of the ticket, since the scheme being a lottery, no right of action can grow out of it.

Master and servant — statute requiring guarding of machinery — portable machine. An unusual question was presented in Chapman v. Piechowski, 153 Wis. 356, 141 N. W. 259, annotated in 45 L.R.A. (N.S.) 687, which holds that a statute under a title, "An Act to Regulate Factories, Workshops, and Other Places of Employment," which requires the guarding of all shafts, fly wheels, etc., of manufacturing establishments so located as to be dangerous to employees in any such place of employment, does not apply to a portable threshing machine.

The only two other cases discussing the question take a contrary view.

Master and servant — time clock — refusal to use — deduction of pay. The first case to pass upon the right of a master to withhold the wages of a servant who

has failed to punch a time clock or otherwise to record his time, seems to be Matthews v. Industrial Lumber Co. 91 S. C. 568, 75 S. E. 170, 45 L.R.A.(N.S.) 644, which holds that the pay of an employee cannot be withheld for his refusal to obey a rule of the employer requiring him to register his time on a time clock, if he has not assented to such rule.

Municipal corporation — liability for negligence of library employees. The first case treating of the liability of a municipality for the negligence of a library employee is Johnston v. Chicago, 258 Ill. 494, 101 N. E. 960, 45 L.R.A.(N.S.) 1167, which holds that a municipal corporation which, under statutory authority, organizes and attempts to maintain a public library for the use of its inhabitants, is liable for injury caused by the negligence of a library employee in transporting books by automobile from one branch of the library to another.

Municipal corporation — negligent injury — notice — service on wrong officer — effect — upon whom may notice of injury or claim against municipality be served. The answer to this question depends, of course, largely upon the phraseology of the various statutes, the only real conflict being as to whether or not the terms of such statutes must be strictly complied with. Some of the courts expressly say that they are mandatory and must be strictly complied with, while others say that substantial compliance which fulfils the purpose of the statute is sufficient. That service of notice of an injury through the negligence of a municipal corporation, upon the mayor, instead of the clerk, as the statute requires, will not defeat the action, if the mayor accepted the service on behalf of the city, and the clerk and counsel received full notice in their official capacity of the accident and the injury arising therefrom, is held in the Colorado case of Powers v. Boulder, 54 Colo. 558, 131 Pac. 395, annotated in 46 L.R.A.(N.S.) 167.

Pension — for Confederate soldiers — validity. Services rendered by Confederate soldiers to their state are held in Bosworth v. Harp, 154 Ky. 559, 157 S. W. 1084, annotated in 45 L.R.A.(N.S.) 692, to have been public within the meaning of a constitutional provision forbidding the granting of separate public emoluments except in consideration of public services, so that a pension may be granted to them by the state for such services.

Principal and agent — fine paid by agent — recovery from principal. The first case directly passing upon the question of the right of reimbursement for fines or penalties which an agent has paid in the principal's behalf seems to be Mills Novelty Co. v. Depouy, 121 C. C. A. 452, 203 Fed. 254, 45 L.R.A.(N.S.) 788, which holds that a manufacturer in one country shipping machines to his agent in another, which are confiscated by the government of the latter as gambling devices, is not bound to reimburse his agent for fines paid by him because of the importation of the machines, although the manufacturer improperly invoiced them and the agent acted only to protect the manufacturer's interest, since a recovery would be against public policy.

Reference — right of referee to resign. There is a dearth of authority on the right of a referee to resign. The Missouri case of State ex rel. Wright v. McQuillin, 158 S. W. 652, 46 L.R.A.(N.S.) 67, holds that a referee is not an officer within a constitutional provision forbidding officers to resign, and that a referee should be permitted to resign for cause, such as bias or prejudice in the case.

Set-off — action to enforce tax — applicability. That a statute permitting taxes to be collected by suit, as upon contract, does not change the quality of the tax so as to make applicable a statute permitting set-off in actions upon contract, is held in Charlotte v. Keon, 207 N. Y. 346, 100 N. E. 1116, 46 L.R.A.(N.S.) 135.

Settlement — mistake — setting aside. That the settlement of an account for a less amount than was due, because of a mutual mistake as to the state of the account, may be set aside and the true balance recovered, is held in the Colorado

case of Beck v. School Dist. 54 Colo. 546, 131 Pac. 398, annotated in 46 L.R.A. (N.S.) 279.

Tax — on insurance premium notes. Premium notes taken by an insurance company from an owner of property insured by it, to meet assessments levied to pay losses as they occur, are held in Kentucky & L. Mut. Ins. Co. v. Com. 153 Ky. 824, 156 S. W. 897, 45 L.R.A.(N.S.) 597, not subject to taxation in the hands of the company prior to the time assessments are made against them.

This seems to be the first case which has passed upon this question.

Tax — on perpetual lease. A lease of land to a person for as long as he, his heirs, or assigns shall pay a stipulated annual ground rent to the lessor or his heirs or assigns, and shall comply with the covenants therein stated, is held in Penick v. Atkinson, 139 Ga. 649, 77 S. E. 1055, annotated in 46 L.R.A.(N.S.) 284, to create a base or determinable fee, and the property should be taxed to the lessee as owner.

Practically all the decisions support the holding in this case, that land under a perpetual lease is taxable to the lessee.

Tax — return — suit to recover. The right to recover back taxes, voluntarily refunded to the party originally paying them, which had been but once previously before the courts, was considered in the Iowa case of Adair County v. Johnston, 142 N. W. 210, 45 L.R.A.(N.S.) 753, which holds that a county which, with knowledge of the facts, returns money voluntarily paid in satisfaction of a tax assessment subsequently declared to be invalid, cannot maintain an action to recover the money so paid, although it could not have been compelled to make the refund.

Telephone — long distance message — liability of employer. The first case involving the liability for toll of a subscriber for permitting a nonsubscriber to use his telephone for long distance messages is the Tennessee case of Cumberland Teleph. & Teleg. Co. v. Southern R. Co. 156 S. W. 853, annotated in 45 L.R.A.(N.S.) 990, which holds an employer is not, although he permits his employees to have access to his telephone, personally liable for long distance messages sent by them concerning their personal affairs.

Trover — to recover tax receipts. The first case in which a possessory action was brought for the purpose of recovering tax receipts seems to have been Vaughn v. Wright, 139 Ga. 736, 78 S. E. 123, 45 L.R.A.(N.S.) 785, which holds that trover may be maintained for the wrongful conversion of every species of personal property which is the subject of private ownership, and which belongs to the plaintiff and is of some value to him, though it may have no commercial value. Accordingly trover lies for the recovery of tax receipts alleged to be of value to plaintiff.

Trust — modification by equity — hastening payment. The power of a court of equity to break in upon the terms of a trust which neither expressly nor impliedly authorizes such a course to be taken, by directing all or a part of the income or principal of the trust estate to be handed over to or expended for the benefit of the beneficiaries of the trust before the time fixed for its enjoyment, was considered by the court in the Tennessee case of Bennett v. Nashville Trust Co. 127 Tenn. 126, 153 S. W. 840, annotated in 46 L.R.A.(N.S.) 43, which holds that equity may direct the present payment to the beneficiary of the income of a fund placed in trust to accumulate until she reaches a specified age, if intellectual promise, the need of education, and necessitous circumstances, unforeseen by the testator, have wrought such a change in her condition that the creator of the trust would have so directed had he foreseen the situation in which she finds herself.

Vendor and purchaser — tax title — acquisition by vendee. That a vendee in possession cannot thereafter acquire a tax title to the land and claim thereunder adversely to his vendor is held in the West Virginia case of Smith v. Boyer, 78 S. E. 787, annotated in 46 L.R.A. (N.S.) 209.

Recent English and Canadian Decisions

[Note.—The more important of these decisions will be reported, with full annotation, in British Ruling Cases.]

Contracts — restraint of trade — necessity of pleading illegality. Where a contract is on its face illegal and unenforceable as being in restraint of trade, it is not necessary, in order that its illegality be available as a defense to an action for its breach, that its illegality should be pleaded. Northwestern Salt Co. v. Electrolytic Alkali Co. [1913] 3 K. B. 422.

Contracts — restraint of trade — agreement by employee not to engage in business the same as or similar to that of the employer. The validity of covenants contained in contracts of sale or employment, not to engage in the same line of business, is considered at length in Mason v. Provident Clothing & Supply Co. [1913] A. C. 724, in which it was held that an agreement by one employed as a canvasser that he would not, within three years after the termination of the employment, be in the employ of any person, firm, or company carrying on or engaged in a business the same or similar to that of the employer or assist any person employed or assisting in any such business, within 25 miles of London, was—assuming without deciding that the agreement was not too vague, as regards the area of restriction, to be enforced by injunction—in view of the fact that the capacity of the employee must be due mainly to natural gifts as a canvasser and only in a secondary degree to special training, and the fact a person so employed does not become possessed of any special knowledge of the kind recognized as a trade secret, wider than was reasonably necessary for the employer's protection, and therefore void; although it was said that had the employer been content with asking the employee to bind himself not to canvass within an area where he had actually assisted in building up the good will of his business, or in an area restricted to places where the knowledge which he had acquired in his employment could obviously have been used to his prejudice, he might have secured a right to restrain him within these limits.

Evidence — declarations against interest — statement of intention to marry and of paternity of child. The essential features of declarations of a deceased person which are admissible in evidence as declarations against interest are enumerated by Hamilton, L. J., in delivering the judgment of the English court of appeal in Ward v. H. S. Pitt & Co. [1913] 2 K. B. 130, as follows:

1. It is essential that the deceased should have made a statement of some fact, of the truth of which he had peculiar knowledge. The rule applies only to statements as to acts done by the deceased, and not by third parties. It does not extend to cover statements made by a deceased person of what others had told him.

2. It is essential that such fact should have been to the deceased's immediate prejudice; that is, against his interest at the time he stated it. If it may be construed for his interest or against it, or may only be against his interest in certain future events, it is inadmissible.

3. It is essential that the deceased should have known the fact to be against his own interest when he made it, because it is on the guaranty of truth based on a man's conscious statement of a fact, even though it be to his own hindrance, that the whole theory of admissibility depends.

4. The interest to which the statements must be adverse must be a pecuniary one, or, which is only a species of the same genus, a proprietary one. A statement would not be against interest if only generally criminatory; or if merely prejudicial to reputation or social consideration.

Continuing, the learned judge says: "The reasons given for admitting such evidence at all show the stringency of these essential conditions. The case is exceptional, not to say anomalous. The evidence thus admitted is hearsay, and the person on whose credit it rests is beyond cross-examination, and is not even seen by the jury. The ground is

that it is very unlikely that a man would say falsely something as to which he knows the truth as to the statement turns to his own pecuniary disadvantage. As a reason this seems sordid and unconvincing. Men lie for so many reasons and some for no reason at all; and some tell the truth without thinking, or in spite of thinking, of their pockets, but it is too late to question this piece of eighteenth century philosophy."

Statements by a deceased person that he had promised a woman to marry her were held not to comply with these requirements, the promise to marry being in consideration of the woman's promise, and so not against interest. So, also, a statement of an intention to marry was not against interest at the time the deceased made it, though it might possibly become so in the future by being used against him in corroboration in an action for breach of promise to marry, or in affiliation proceedings.

Statements by the deceased that he was the father of an unborn illegitimate child, or admitting the paternity of the child, do not satisfy the condition that the facts stated must be one of which the declarant has "peculiar knowledge" or "direct personal knowledge" to the exclusion of hearsay. Regarded as an admission of paternity the statement is not admissible, because at the time it was not necessarily against his interest, although the expression of it might possibly become so in subsequent legal proceedings.

Intoxicating liquors — selling — quantity in excess of license limit. A restriction whereby the holder of a liquor license must sell only in quantities not exceeding 1 quart is infringed when one person buys for a number of persons several bottles of liquor, although the quantity intended for any one of them is within the limit. Rex v. Campbell, 22 Can. Crim. Cas. 72.

Landlord and tenant — tenant's right to affix window flower boxes. The question whether a lease of premises carries with it the right to use the outside walls, which usually arises out of a claim to the use of such walls for advertising purposes (as to which, see note in 39 L.R.A.(N.S.) 350), was presented in a new aspect in Hope Bros. v. Cowan [1913] 2 Ch. 312, where the question was as to the right of a tenant to place flower boxes outside windows upon brackets fastened to the window frames. It was held that the lease, in which the lessor covenanted to keep in repair the external parts of the demised premises, and to permit the lessees to affix their trade signs, to be approved by the lessors, on the outside of that portion of the building in their occupation, and in which the lessees covenanted not to attach any sign, etc., without consent, and to remove all outside names and trade signs at the termination of the tenancy, and to make good all damage caused to the outside walls of the building thereby, —contained nothing to exclude the operation of the general rule that the demise of a floor or a room or an office bounded in part by an outside wall prima facie includes both sides of that wall.

Libel — privileged occasion — malice — destruction of privilege. Where the author of a libelous pamphlet is found to have been actuated by malice, the fact that it was published upon a privileged occasion does not protect the printer from being held liable as a joint tort feasor. Smith v. Streatfield, 82 L. J. K. B. N. S. 1237, 109 L. T. N. S. 173.

Libel — privileged occasion — report by trade association to member. That a report on the commercial standing and credit of the plaintiff, obtained by the secretary of a mutual society organized for the purpose (*inter alia*) of making such inquiries, the expense being defrayed by membership fees, at the instance of a member, and communicated to him, is not privileged, is held by a divided court in Greenlands v. Wilmshurst [1913] 3 K. B. 507, in which it is incidentally noted that the law is otherwise in America.

Limitation of actions — time of accrual — want of proof. The impossibility of procuring necessary information to bring an action for a wrong, and ignorance of the identity of the author of the wrong, will not prevent the statute of limitations

from running against the right of action to recover damages therefor. Charpentier v. Craig, Rap. Jud. Quebec, 22 B. R. 385.

Master and servant — common employment — agreement with members of union. One who has with other members of his union entered into a written agreement with an employer to work at a fixed rate of wages in loading and unloading steamers, the men being selected, when required, by a union foreman, and who is paid by the employer, who has complete charge of the work, is a fellow servant of other servants of the employer, though the employer cannot dismiss him, but can dismiss the foreman. O'Regan v. Canadian P. R. Co. 41 N. B. 347.

Municipal corporations — right of taxpayer to compel collection of debt. That a taxpayer is not entitled to bring into court a municipal corporation and a person who is alleged to be indebted to it for arrears of water rates, for the purpose of having it declared that the corporation has wrongfully refrained from collecting the alleged debt, and that it is owing by the alleged debtor, is held in Norfolk v. Roberts, 28 Ont. L. Rep. 593.

Negligence — bursting of ginger beer bottle — liability of manufacturer. A manufacturer of ginger beer is not liable for an injury sustained by one who purchased from a retailer a bottle which bursts, where he was not the manufacturer of the bottle, and did not know of the defect therein, although it could have been discovered by the exercise of reasonable care. Bates v. Batey & Co. [1913] 3 K. B. 351.

Negligence — breach of duty — horse and carriage hired by husband — liability for injury to wife. One who let to a husband a carriage with a horse and driver for the purpose of taking a drive, and who ought to have known, if he had used proper care, that the horse was unsafe to be sent out with the carriage, is liable for injuries sustained by the wife in being thrown out of the carriage, both for the reason that it was his duty to the wife, who he must have contemplated would use the carriage, to warn her of the dangerous character of the horse, and for the reason that as he kept control of the carriage and accepted the wife as a passenger, he was under a duty to use reasonable care to carry her safely, and for that purpose to provide a proper horse. White v. Steadman [1913] 3 K. B. 341.

Parent and child — liability of parent for tort of child — effect of parent's knowledge of child's propensity to kick. Although it was held by the appellate court in Corbey v. Foster, 29 Ont. L. Rep. 83, 13 D. L. R. 664, that the evidence was insufficient to warrant a finding that the defendant had notice that his son had on a previous occasion kicked the infant plaintiff, the court took occasion to hold that such knowledge would not be sufficient to render the father liable for damages caused by a kick on a subsequent occasion, there being nothing to show any approval on the part of the father of the son's line of conduct, or that any measures which he might have taken would have prevented the son from acting as he did; and that the rule governing the liability of the owner of a dangerous animal does not apply in the case of parent and child. "Boys," says the court, "cannot be placed in a class like beasts, and labeled *feræ naturæ* or *mansuetæ naturæ* (most parents probably consider their own children *mansuetæ naturæ* and those of their neighbors *feræ naturæ*); nor when a father is notified of an act of violence on the part of his son, can he hang him,—the *patria potestas*, under the ancient civil law, gave the father the power of life and death, but the common law does not recognize such an extreme right. Nor can the father tie up his son—if he is ordinarily *compos mentis*—he must keep him and let him go about. The rules about dogs have never been applied to boys, and we should not be the first to apply them."

Principal and surety — recovery of judgment — giving time to principal as discharge of surety. The rule of law that time given to a principal debtor discharges a surety does not apply when the time is given after a judgment for the debt has been recovered by the creditor against both the principal debtor and the surety. Re A Debtor [1913] 3 K. B. 11.

Shelley's Case — limitation to one for life — remainder to "heir." Does the rule in Shelley's Case apply where the limitation is to one "and his heir at law," in the singular? "It is," says Warrington, J., before whom the question was raised in Re Davison [1913] 2 Ch. 498, "an extraordinary thing that such a question should arise at the present day, and that there should be so little distinct authority upon it as there is." The conclusion reached by the learned judge, after an examination of the decisions bearing upon the question, is that the rule does not apply,—at least where the limitation is contained in a deed.

Waters — liability for bursting of water main — absence of negligence. That the doctrine of Rylands v. Fletcher, L. R. 3 H. L. 330, 1 Eng. Rul. Cas. 235, that one who brings upon his premises something which will cause injury if it escapes does so at his peril, and is liable for any damage occasioned by its escape, applies not only to cases in which the dangerous thing has escaped from defendant's land onto the plaintiff's land and done damage there, but also to cases in which the site of the plaintiff's injury was occupied by him only under a license, and not under any right of property in the soil; and therefore that a water company is liable for damage done to the cables of an electric company by the bursting of its mains in the street, even though it was not negligent, is held in Charing Cross, W. E. & C. Electricity Supply Co. v. London Hydraulic Power Co. [1913] 3 K. B. 422.

Rice, Stix & Co. v. Sally, 176 Mo. 107.

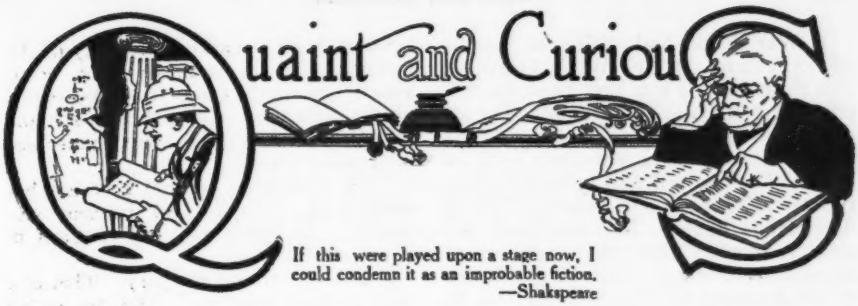
By W. A. PETREE.

When Sarah, the wife of Sally, James B.,
All loving, confiding and true
Turned over to Jim her money and he
The same in his business ran through,
Then the loving James B. came home as he should
And his lawyer called up in the night
To secure to his frow as well as he could
The assets remaining in sight.

And the lawyer, good soul, he set him to work
Determined sweet Sarah to save.
All the creditors fierce, he'd stop with a jerk;
He'd make all the Shylocks behave.
A full armored mortgage, case hardened, he drew,
From Sally to Sarah his wife.
He had it acknowledged and swiftly he flew
To file it and thence grew the strife.

The creditors yelled till black in the face
At this the good lawyer had done.
More lawyers they hired to handle their case;
Decisions were found by the ton.
"The husband and wife can't deal, don't you know,
For Sally and Sarah are one,
Trustees must be had or else its no go;
So equity principles run."

The Court, with a frown, the precept laid down,
"The Statute makes Sarah as sole;
If sole, we admit, no husband the crown
Of sweet Sarah Sally'd control,
But Sarah, once sole, with Sally could deal,
Could lend, take a mortgage or buy.
As if she were sole we decide the appeal,
We couldn't do less if we'd try."



If this were played upon a stage now, I could condemn it as an improbable fiction.
—Shakspeare

The Judge's French Was Lame. Judge VanderCook, one of the early members of the bench in Pennsylvania, was not only a courtly gentleman and an able jurist, but a man in whose character was beautifully blended unimpeachable integrity as well as childlike simplicity. He was holding court in his circuit on one occasion when a case was on trial concerning a quantity of syrup which it was claimed had turned sour by reason of having been kept in a cellar, but which would have remained sweet had it been stored in more suitable quarters. So the owners of the syrup brought suit against the storage warehousemen for the value of the syrup.

The plaintiffs put up a witness on the stand, a voluble little Frenchman, who testified glibly that they "put the *surop* into the *souterrain*" (which is supposed to be French for *vault* or cellar or cavern), "and becaus it could not kip swit in dat place *he turn sour*."

The amiable judge's face during this testimony assumed an expression of deep study, and relapsed into one of utter bewilderment, as the witness left the stand and his Honor remarked:

"I cannot understand at all, I am quite befogged."

"He says,"—began the counsel.

"Yes, yes, yes," interrupted the judge, "I know perfectly well what he said, but to save my life I cannot understand why syrup should turn sour in a *soup tureen* any sooner than it would in any other vessel."

That night at dinner the judge had to suffer some badinage when he discovered that he had confounded the Frenchman's French with his soup, and totally misconceived the point of his testimony.

Reciprocity. Some years ago when the late Judge I. C. Parker presided over the Federal court for the western district of Arkansas, at Forth Smith, says Hon. T. S. Osborne, of Fort Smith, Arkansas, the following incident occurred:

A young man by the name of "Jim" Bowman, who was raised up in the hills of Newton county, Arkansas, was arrested and brought before the distinguished jurist, charged with "bootlegging," or selling whisky without having paid the special tax required by law. Being present in the court room at the time, the judge requested me to see the prisoner and find out how he desired to plead to the indictment. After consulting a few minutes, I found that he was guilty as charged, and that there was no proper course for him except to so plead, which was accordingly done; and it not being a very grievous case, the judge sentenced him to thirty days in jail and to pay a fine of $100.

After the sentence had been imposed the eminent jurist proceeded to give the young man, who was not very bright, a little fatherly advice. He said: "Jim, I understand you are only nineteen years old, and that you have a wife and baby at home. You are a nice-looking boy, and I will tell you what I want you to do. Go down to the jail and serve your time, conducting yourself well while there, and, when you get out, go back home and take care of your wife and baby. You are young yet, and you ought to study and try to improve your mind. Reform, and try to be an honest man, and become a good citizen in the community where you live."

Feeling much impressed, in serious tones. Jim promptly replied: "Thank you, judge, the same back at you."

It Was Worth $20. "In the middle sixties," states Mr. E. W. McGraw, of San Francisco, "I was present in the district court at Boise City, Idaho. The attention of the court was occupied by the trial of a case on appeal from justice's court. The plaintiff had brought suit to recover $20 for a job of painting done in defendant's house. The defendant, for answer, denied that the services of plaintiff were of any value whatever, but on the contrary that the painting was so unskilfully done that his house had been damaged thereby in the sum of $20, for which amount he claimed judgment.

"Mr. S., attorney for the plaintiff, was a good deal under the influence of John Barleycorn, but nevertheless made a gallant fight for his client.

"Addressing the jury, he said: 'Gen'l'men, you know my client done this painting, but along comes every other dam painter in town and swears that the work of my client wasn't worth a dam. Gen'l'men, such test'mony as that is unworthy of consid'ration by enlightened and intelligent jurors. Ev'ry one of those painters wanted the job himself. Their evidence is all the result of perfeshnal jealousy. It's curious, gen'l'men of the jury, that whenever one mechanic does a job that the other mechanics wanted, every one of them dam other mechanics will swear that his services wasn't worth a dam. All perfeshnal jealousy, gen'l'men. There's no such jealousy, gen'l'men, 'mong the distinguished legal perfesh'n of which I and my brother Col. G. are ornaments. Suppose my brother Col. G. brings suit for a fee and I am called as witness. Do you suppose I would swear that the services of my learned friend Col. G. wasn't worth a dam? Not much, gen'l'men of the jury, not by no means. I'd swear that my learned friend exceeded in knowledge of the law Chief Justice Marshall; that in eloquence Dan'l Webster couldn't hold a candle to him; that Rufus Choate was as to him a pigmy compared to a giant—but no, gen'l'men of the jury, I couldn't tell a lie; but anyway I'd swear that the services of my learned and venerable friend was worth the sum of $20.'

"Col. G., the attorney for the defendant, was tall, gaunt, gray headed and gray bearded, with a marked solemnity of demeanor, and a sonorous bass voice, which apparently came from the region of his stomach. He spoke slowly and rolled the vowels in his speech in a most impressive manner.

"His peroration on that occasion has escaped the compilers of forensic eloquence. As nearly as I can recollect it, it was as follows:

" 'Gen-tle-*men* of the jury. This is a most solemn occasion. You are called upon to perform a most sacred duty which falls to the lot of the American citizen. You are to decide between this rapacious plaintiff and my wronged and injured and suffering client. Seated, as you are, in the fair capital of the glorious territory of Idaho, while over your heads waves the illustrious flag for which so many of your countrymen have lately fought and died; subject as you are to the jealous scrutiny of the whole people of this territory watching to see if you shall prove recreant to your solemn duty; surrounded as you are in this hall of justice by the sacred influence of the Constitution and the laws; sworn as you are on the ho-oo-ly evangelists of Almighty God to decide according to the law and the evidence, you cannot fail to render a verdict for my client for $20.' "

We regret that Mr. McGraw did not state which side won.

Fortunes Made in Prison. Although most criminals find the time of their imprisonment hang very heavily, says Tit-Bits, it sometimes happens that convicts have made such good use of the hours spent in jail that they have earned large sums of money to help them when their sentences have expired. Recently a convict while an inmate of an Ohio penitentiary studied electricity to such good purpose that he invented an electrical street-sweeping machine and other useful appliances that will probably bring him a large sum.

Another American convict made a big fortune some years ago by inventing a new collar button while he was serving his sentence. The idea was taken up by a big firm in Pittsburgh and was very successful.

A man serving a sentence in an Ari-

zona prison invented a new device for absorbing electricity from the air, and the prison authorities were so struck with the possibilities of his invention that they liberated him long enough to go to Washington to file an application for a patent.

It is not only by inventing, however, that prisoners make money. A criminal who was sentenced to prison for complicity in a murder in Italy recently had four of his plays accepted by a firm of publishers in Rome. All the plays were written within the four walls of a gloomy cell. Another Italian convict, a brigand, who was sentenced to thirty years' imprisonment for his evil deeds, wrote many clever stories while he was in jail, which were accepted and well paid for by the editors of several newspapers.

A Hungarian woman prisoner who was sent to jail for having egged on her lover to commit a murder wrote a charming waltz while she was in prison. The piece was published and became so popular that its composer made a small fortune out of the sales.

Probably the largest sum ever made by anyone while serving a sentence for crime was the amount earned by a convict who was confined in the state prison at Waltham, Mississippi. Finding the time hang very heavily on his hands, he determined to set to work to invent something that would not only prove useful to his fellowmen, but that would earn him enough to keep him when he had regained his liberty. After much thought he was lucky enough to hit upon a device which abolished the necessity of a bobbin in the sewing machine. This may sound a simple invention to the uninitiated, but it was thought so well of by experts that its imprisoned inventor was offered the huge sum of $100,000 for it by a company in New York. Needless to say, he accepted the offer.

Some Queer Legacies. When they opened the will of Miss Mathilda Tommet in Milwaukee the other day, states the New York Sun, they found that one of her bequests was a pair of old shoestrings given to a woman relative with whom she had been on friendly terms for many years. There did not appear to be any sarcasm or ill feeling connected with the legacy, and judged by the common-sense way in which the remainder of her property was bestowed there did not seem to be ground for the suspicion that the decedent was not in her right mind.

The cases are numberless in which odd things have been bequeathed and countless have been the contests to break wills that contain provisions along lines similar to that of Miss Tommet's will. In New Orleans there died not long ago a wealthy old man noted for his shrewdness in business deals. One of the bequests of his very long will was a hair brush that he had used for many years.

This brush he gave to a nephew, Samuel Thompson Finnerty—who had been named after the old man—with the proviso, however, that the brush should be kept in the Finnerty family vault one month out of twelve and in a mahogany box containing an electric belt that the decedent had worn for years. The acceptance of the brush, conditional on carrying out the old man's wishes, meant that the nephew was to inherit and enjoy two thirds of the estate. The rest of the will was sound and tight in every respect, according to the lawyers.

Margaret Ann Epping, of San Francisco, left $5,000 each to ten of her nephews about six years ago, but this was the condition: Her tombstone was to be replaced every two years with a new one on which each nephew in turn "should cause to be chiseled an appropriate verse setting forth his love and affection." As the bequests were in the shape of annuities from a bulk fund, the nephews, in order to draw upon the fund for their income, had to comply with the demands of the decedent. One nephew sued and was beaten. Although under the terms of the will he was to forfeit his share for contesting, the will was so construed and interpreted that he still received his annuity, but subject to the new tombstone conditions.

Jabez Hollister, of Montreal, left his two sons the use of a corn razor that he —a cutler—had specially ground and fixed up for chiropedic use. "For the sake of their health and the risk they ran from blood poisoning if other corn cutters were used," the sons were admon-

ished to use no other cutter, and a cash amount was to be forfeited if they disobeyed. One son, after he had recovered from the shock of his father's death, laughingly told the lawyers that he had never had a corn in his life. But the lawyers insisted that his father was likely to have known whether he had or not.

A Louisville widow found that when her husband's will was opened he had bequeathed her his bath robe. And these were the words that went with the bequest: "Inasmuch as she has deprived me so often of the comfort and convenience of the garment that was bought for my own personal use, by wearing the aforesaid bath robe at times when I desired and needed it most, I bequeath it to her with all my love and hope she will ever find it the same tried and faithful servitor even though Providence should bless her with another husband who may have a bath robe to spare." The decedent was called the Mark Twain of his neighborhood in Louisville.

There is one actual case on record of a bequest of artificial teeth. But as it was so long ago the legal chroniclers think the decedent had in mind the sale of the teeth to the dentists of the time so that cash might be realized. Many cases are narrated of women bequeathing their hair to their heirs to be converted into money.

When Fees Were Paid In Boots. The late Chauncy Schafer, of the New York bar, told me, writes Judge J. W. Donovan, this story of his early practice, that has appeared in a legal work on trials that I had to do with. Yet I believe it will be of interest to lawyers.

Young Schafer then lived at Marshall. He was a large, strongly built farm boy, who was recently admitted to practice, when a farmer from Bellevue engaged him to defend him in an assault and battery case, and agreed to give Chauncy a store order for a pair of boots, and if he won the case, for two pairs.

On the return day, at the end of a week, Chauncy met his client, who spoke rather coldly and told him he had engaged John Van Arman, the big Chicago criminal lawyer, who happened to be in Marshall at the time. To this Chauncy replied: "Then what becomes of my winter boots?" "Oh, I dunno, I only need one lawyer like Van Arman," said the client.

Then Schafer let go some rather strong sentences about turning a young man down on his first case, after he had looked up the law on it for a whole week. This was overheard by the newly elected prosecuting attorney, who took a fancy to Schafer's earnestness, and said, "Get a release from him, and I'll hire you for the people," which was done.

The trial was by jury in a ballroom after dinner, and when each side rested, the young prosecutor opened mildly and was followed by Van Arman in a mild defense. That left Schafer to make the closing argument, which was fully up to the standard of pioneer eloquence. Something like this:

"There are only two reasons, gentlemen, said Schafer, "that I will urge to show that this defendant is guilty. One is, He is guilty as hell; the other is, His conduct toward his first counsel—I was that counsel. It was my first case, and he knew it, and you are deprived of that argument that I spent a week in learning—one of the best boy arguments ever delivered in Calhoun county, gentlemen. And he promised me one pair of boots to defend him, and two pairs if I cleared him. Did he lie when he made that promise? Am I to go barefoot all winter on such a promise?"

The court room rang with laughter, as Schafer closed, saying: "A man who will lie to his counsel will lie to a jury, and no one can trust him." The jury said, "Guilty," and the justice fined defendant $100.

"Justice of the Peace, Law, West of the Pecos." This sign still shows dimly over the door of Judge Roy Bean's residence, justice shop, saloon, and store at Langtry, Texas. Roy Bean was the best-known character in Western Texas in the old days before the coming of the law. He administered justice from the Revised Statutes of Texas and his lore of common sense.

When a Chinese coolie was killed by a rancher the trial was held by Judge Bean in his little shop. After hearing

the evidence he thumbed the Revised Statutes and dismissed the defendant with the ruling that there was nothing in the law book making it a crime to kill a Chinaman. Another time he held an inquest over the body of a cowpuncher who had been killed. The man had a six-shooter in his hip pocket, and a $20 gold piece in his other pocket.

Judge Bean fined the corpse $20 for carrying concealed weapons, and confiscated the gun and the gold coin. He died a number of years ago, but his home has been left just as he left it and may be seen from the Southern Pacific trains through Texas.

On Whom was the Joke? Senator Ollie James likes to tell jokes on his friends, and is responsible for the following one, says the Washington Star:

"Oscar Turner and Judge James Bennett were opposing candidates for Congress in Kentucky. They had long been bosom friends, and did not let their political fight interfere with their friendship. In fact, they made the campaign together.

"One night about dusk they rode up to a farmer's house and asked to spend the night. It was too dark for their host to recognize them. As they were unhitching their horses, Judge Bennett asked the farmer whom he intended to vote for.

" 'For Turner,' he answered promptly. 'Everybody round here's going to vote for Oscar.'

"The judge, thinking to be funny at the expense of his friend, remarked: 'I am surprised at that! Why, don't you know Turner is drunk all the time! He couldn't possibly stay sober long enough to attend to the public's business.'

" 'Yes,' said the rustic. 'I've heard that he drinks a powerful sight, but we'uns believe that he's got more sense drunk than Bennett's got sober!'

"Needless to say they never told the farmer who they were, but they had a great argument the next day as to whom the joke was on."

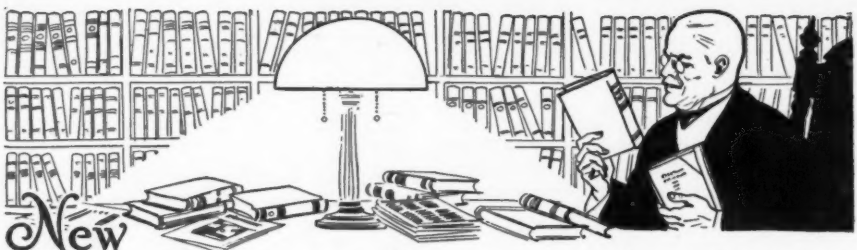
An Artistic Touch. That poets strum their lyres in vain is a theory generally accepted, but there is one verse writer in Kansas City who still can realize on his "wares," as a young lawyer in a downtown office building can testify. Though himself an attorney, as yet of the briefless kind, he was unable to retain the lonely dollar in his "jeans," when appealed to in this manner:

"Can you spare me to-day one measly plunk? For I'm down and out and am feeling punk, and the way is long and the roads are rough and the street car man won't take my bluff, and I hate to walk and I hate to steal, and I'm too darned bashful to beg a meal. The gray wolf howls and my 'dawg' gets kicks, and I'm stranded—broke—in a heluva fix. Then some sweet day when you get your wings and twang your harp of a thousand strings, the heavenly choir its noise will stop and watch you alight with a graceful flop, and say: 'Old sport, you're a bully chap; you can have your choice on the golden map.' "

Snakes as Industrial Hazards. Rattlesnakes infesting a country where road work is being done constitute an "industrial hazard" and a workman bitten by a snake is entitled to compensation from the State industrial insurance fund, according to a ruling contained in the report of the State Industrial Insurance Commission, made public recently. The commission granted a claim for injury benefit.

Other peculiar rulings are recorded in the report. A boy shot a workman in the eye with an airgun. The commission accepted the gun as an industrial hazard and the claim for injury was paid.

A brutal boss does not constitute a hazard within the meaning of the law as interpreted by the commission, however, and a man who was whipped by his employer was denied a compensation. A similar ruling was made in the case of a workman who was sought out by an enemy and killed, the commission refusing to grant a pension to those dependent on the workman.



New Books and Recent Articles

Whence is thy learning? Hath thy toil O'er books consum'd the midnight oil?—John Gay.

"The Income Tax Law of 1913 Explained." By George F. Tucker (Little, Brown & Co., Boston) $1.50.

The design of this work, as stated by the author, is to present the provisions of the present Federal law imposing a tax upon incomes, with explanatory observations, and with the citation of rulings and decisions upon former acts.

Among the subjects treated are questions of net income, deductions, returns, penalties, taxation of corporations, and remedies of taxpayers.

The regulations of the Treasury Department to October 31, 1913, regarding the deduction of the income tax at the source, form part of the volume.

"Problems of To-day: Social Studies and Suggestions." By Cairoli Gigliotti, of the Chicago Bar. The writer of this treatise has sought to group and place before his readers a number of problems which have been heretofore discussed separately, and for which he considers no adequate remedy has been suggested. He treats of the obligations imposed upon the United States by the Monroe Doctrine, urges the military instruction of able-bodied citizens, suggests the choice of officers in open elections uncontrolled by party machines, advocates appointments to the civil service by competent, impartial commissioners, desires a higher moral tone in the press, which he believes should advocate needed reforms rather than give publicity to the deeds of criminals, to divorce cases and similar subjects.

The author believes that prevention is better than repression of crime, favors the public ownership and control of all charitable institutions, urges governmental control of the telegraph and railroad service, deplores race prejudice, suggests the regulation of immigration, and would have labor troubles settled by the verdict of fair and disinterested commissioners.

Mr. Gigliotti has presented in small compass the most important questions now before the public, and asks candid consideration of his proposed remedies.

"Law of Corporations Having a Capital Stock." By William W. Cook (Little, Brown, & Co., Boston). Seventh Edition. 5 vols, $32.50.

In the January CASE AND COMMENT the price of this work was erroneously stated to be $2.50. The correct price appears above.

White & Locklar's "Arkansas Citator of the Arkansas Reports." 1 vol. Cloth, $6.50.

"The Corporation Manual." 18th ed. Edited by John S. Parker. 1 vol. India paper, Buckram binding, $10.

"Federal Jurisdiction and Procedure." (Hornbook) By R. M. Hughes. 2d ed. Buckram, $3.75.

"The Constitution of Louisiana of 1898 as Amended to November 1, 1913." Annotated by Theodore Cotonio. 1 vol. Sheep, $12.

"Annotated Code of Maryland." Edited by George P. Bagby. Vol. 3 (Crimes and Punishments, and Public General Laws.) Law Sheep, $10.

"Workmen's Compensation Law." (Illinois) By Samuel R. Harper. 1 vol. $5.

"Municipal Corporations." (Hornbook) By R. W. Cooley. Buckram, $3.75.

"Latest Supplement to Wetmore's South Carolina Citations." $2.50.

Recent Articles of Interest to Lawyers

Arbitration.

"The Limitations to the Judicial Settlement of International Disputes."—77 Central Law Journal, 310.

Army and Navy.

"The Old Man-of-War's Man."—Scribner's Magazine, January, 1914, p. 31.

Attorneys.

"Practical Activities in Legal Ethics."—62 University of Pennsylvania Law Review, 103; 46 Chicago Legal News, 154.

"Schools of Law and Legal Studies."—33 Canadian Law Times, 1130.

"A Paris Law School Examination."—62 University of Pennsylvania Law Review, 187.

"Suggestions from Law School Graduates as to Where and How to Begin Practice."—27 Harvard Law Review, 260.

"Inns of Court and Admission to the Bar in England."—13 The Brief, 289.

"The French Bar."—23 Yale Law Journal, 113.

Banks.

"The Law of Banking."—30 Banking Law Journal, 985.

"Modern Banking and Trust Company Methods."—30 Banking Law Journal, 997.

Bills and Notes.

"The Negotiable Instruments Law."—30 Banking Law Journal, 957.

Boundaries.

"The Seashore as the Boundary of a District."—77 Justice of the Peace, 589.

Brokers.

"The Blue Sky Law."—7 Maine Law Review, 44.

Business Systems.

"Practical Business Systems Adapted for Use in Law Offices."—20 Case and Comment, 521.

Canon Law.

See Religious Societies.

Checks.

"Post-Dated Cheques."—49 Canada Law Journal, 721.

Church.

See Religious Societies.

Citizenship.

"State Citizenship."—2 Georgetown Law Journal, 11.

Constitutional Law.

"May Ratification by a State of an Amendment to the Federal Constitution be Repealed?"—20 Case and Comment, 548.

"Is Unreasonable Legislation Unconstitutional?"—62 University of Pennsylvania Law Review, 191.

"Judicial Powers and the Constitution."—46 Chicago Legal News, 154.

"The Recent Constitutional Amendments."—23 Yale Law Journal, 129.

Co-operation.

"Co-operation by Farmers."—The Fra, December, 1913, p. 72.

"Competition and Co-operation."—The Fra, December, 1913, p. 86.

"Co-operation the Twentieth Century Way."—The Fra, December, 1913, p. 94.

Corporations.

"Corporations as 'Persons.'"—77 Justice of the Peace, 601.

"Stockholders' Rights of Inspection and Examination. Part II."—7 Bench and Bar, 59.

Covenants.

"Enforcement of Restrictive Covenants."—136 Law Times, 160.

Criminal Law.

"Some Causes of Crime."—6 Lawyer and Banker, 331.

"Whipping in Delaware."—13 The Brief, 278.

"Committals to Quarter Sessions or Assizes."—77 Justice of the Peace, 603.

Damages.

"The Rule of Private Corporation's Liability for Exemplary Damages."—77 Central Law Journal, 314.

Discovery.

"Discovery and Inspection."—7 Bench and Bar, 52.

"Secrets of State as Evidence."—17 Law Notes, 164.

Drama.

"Romeo and Juliet."—The Century Magazine, January, 1914, p. 399.

Elections.

"State Assumption of Nomination and Election Expenses."—23 Yale Law Journal, 158.

"The 'Grandfather Clause:' Attack on the Constitutionality of the Oklahoma Law in the Highest Court."—6 Lawyer and Banker, 358.

Equity.

"Roman Aequitas and English Equity."—2 Georgetown Law Journal, 16.

Eugenics.

"Care of Our Mental Degenerates."—6 Lawyer and Banker, 326.

Elections.

"The Maxim Silencer."—20 Case and Comment, 530.

"Maje: A Love Story."—Scribner's Magazine, January, 1914, p. 2.

"The Geniuses of Lutton's Hill."—Scribner's Magazine, January, 1914, p. 81.

Foreign Countries.

"The Caribbean Tropics."—The Century Magazine, January, 1914, p. 368.

"The German Emperor and the Balkan Peace."—The Century Magazine, January, 1914, p. 411.

"The Tragic Ten Days of Madero."—Scribner's Magazine, January, 1914, p. 97.

"Tunisian Days."—Scribner's Magazine, January, 1914, p. 16.

Government.

"Reverence and Relevancy." (Respect for fundamental principles of American government and constituted authority.)—17 Law Notes, 166.

Guaranty.

"Surety and Bank Guarantee."—136 Law Times, 136.

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The Nation's Need.

Knowledge of the law is one of the nation's greatest needs. Liberty in society cannot exist without laws embodying principles of equality and justice, and an authority strong enough to enforce those laws against all transgressors. A government based upon the popular will must be supported by people who understand and appreciate this and who will select representatives familiar with the principles of these laws and qualified to so change and fashion them that they may conform to the changing needs of the people. Every citizen should therefore understand the constitution of his state and nation and have a general knowledge of the nature, scope and principles of the laws in force therein. Certainly no one should be considered educated who has not this knowledge.—Henry S. Wilcox.

Judges and Lawyers

A Record of Bench and Bar

Hon. Benjamin Wall Kernan

President of the Louisiana Bar Association

By S. R. DAVIS

THE bench and bar of Louisiana have always stood for the highest ideals and ethics of the profession. The Louisiana Bar Association, composed as it is of the leading members of the bench and bar of the state, is the efficient instrument through its organization of preserving the fine traditions of the bar of Louisiana and enforcing the observance of the ethics of the profession. This service of the Bar Association is not merely formal or perfunctory; it requires much more than that. It requires the courage of conviction and positive action, and it does not hesitate to take the initiative in disciplining or bringing to book any lawyer who violates the ethics of the profession or the laws of the state. The result is wholesome, and in no state in the Union is the lawyer regarded with greater respect than by his laymen fellow citizens.

HON. BENJAMIN WALL KERNAN

To be president of the Louisiana Bar Association is a distinguished honor, and this honor came to Mr. Kernan at its last annual meeting, April 13, 1913. To those of the profession who know Mr. Kernan it is superfluous to say that he fills the position with dignity and ability, and brings to its service the unbounded energy and enthusiasm so characteristic of the man.

Benjamin Wall Kernan, son of Judge William Fergus Kernan and Sarah C. Wall, was born in Clinton, East Feliciana Parish, Louisiana, September 24, 1869. He was educated in a private school in Clinton and prepared for college at

Chamberlain Hunt Academy, Port Gibson, Mississippi. He entered the regular college course of Tulane University in November, 1886, and attended until June, 1888. He entered the law office of his father in 1889, and from January until June, 1890, was editor and owner of the Southern Watchman, published at Clinton, Louisiana. He entered the Law Department of Tulane University in November, 1891, and graduated with degree of Bachelor of Laws in May, 1892. Soon after his graduation he entered the law office of his brother-in-law, Honorable Henry P. Dart, and was admitted to partnership with him in 1895, under the firm name of Dart & Kernan, which now, with the addition of two of Mr. Dart's sons, has become Dart, Kernan, & Dart. Not the least important episode in Mr. Kernan's life was his felicitous marriage June 27, 1906, to Miss Alice Lange, of New Orleans.

Mr. Kernan's firm represents a large clientage, among which are the following firms and corporations: The Lafayette Insurance Company, City Bank & Trust Company, Isidore Newman & Sons, Ford, Bacon, & Davis, American Cities Railroad Company, New Orleans Railway & Light Company, Elder-Dempster Company, and Leyland & Co.

Since 1908 Mr. Kernan's time has been largely devoted to the trial of personal injury cases, a majority being suits brought against the street railway and electric light companies represented by his firm. However, his activities are by no means confined to these cases. Although either party can call a jury, a very large majority of all civil cases are preferably tried before the court, and even the largest damage suits. This fact is worthy of note as showing the high esteem for fairness and ability in which the nisi prius judges of Louisiana are held by the lawyers of the state. Mr. Kernan's reputation as a negligence lawyer of ability is recognized by his fellow members of the bar, and it rests upon solid foundations. He never rants before the court or jury; he does not browbeat witnesses on the opposite side, or cause his own witnesses to give unfair testimony; he tries his cases with an open candor and fairness, and argues to the jury or court in a straight talk without oratorical frills, but with all the logic and reason at his command. The result is that in personal injury cases Mr. Kernan's tact and his careful methods save his clients from being mulcted in excessive or unfair damages.

In his office and in court Mr. Kernan is alive and alert, but always courteous and obliging. Out of court and office, with his professional duties laid aside for the time being, Mr. Kernan is the gracious and dignified gentleman, the engaging social companion, and always dependable friend.

Mr. Kernan's professional activities preclude many vacations, but he is a lover of "all outdoors," and one of his diversions is the genial fellowship of the Country Club, of which he was president for two successive terms, 1910-11. To enumerate his professional friends would be to call the roll of the whole bar of the state; to enumerate his friends on the outside in the fair city of New Orleans would cut a wide swath in the city directory.

Death of a Prominent Mississippi Lawyer.

Honorable G. Q. Hall, of Meridian, Mississippi, died suddenly in New Orleans December 8th ult., aged sixty-four years. His sudden death from heart failure was a great shock to his many friends of the bench and bar of Mississippi, and especially to the people of Meridian, where he was held in the highest esteem as one of its leading citizens.

Judge Hall held the office of circuit judge for one term, and declined reappointment, preferring the active practice of his profession. During his judicial term he won deserved distinction as an impartial and able judge and the bar of his district keenly regretted his retirement. At the bar he was known as a fine trial lawyer, and his firm (Hall & Jacobson) was engaged in many notable cases involving great legal questions which they brought to successful termination.

Judge Hall was a typical southern gentleman, with a distinct personal charm of manner that made him popular with all classes of his fellow citizens, who will feel a sense of personal bereavement at his loss.

Hon. A. W. Frater

A Prominent Washington Judge

HONORABLE A. W. Frater, judge of the superior court of King county, Washington, was born, reared, and educated in the state of Ohio. His legal education was acquired as a student in law offices and while a deputy clerk and clerk in the office of probate judge and other courts of record, being a law clerk at all times while pursuing his legal studies. In his early career he also had a large experience in the newspaper and banking business. He located and began the practice of the law at Brainerd, Minnesota, in 1881, from which place he came to the Pacific coast in 1887, since which time, except for the period of seven months in California, he has resided in the state of Washington.

Judge Frater became a factor in the public affairs of the state of Washington almost immediately after his arrival in the state. In 1890 he was elected to the state legislature, the second sitting of that body, and filled the important office of chairman of the judiciary committee. It is a remarkable fact that, although the constitutionality of many of the acts of that legislature were passed upon by the state supreme court, none of them were held unconstitutional. In 1904 he was elected to the position he now holds, and has been twice re-elected to that position, each time by increased majorities, his majority at his last election being greater than that of any other candidate on the judicial ticket, the people as well as the bar thus emphasizing their confidence in him as a citizen and jurist. As judge of the superior court he served in the civil department one year, two years and three months in the criminal department, three years in the equity department, and the remainder of the time in the equity and probate departments. Since the institution of the juvenile court in 1905, in addition to serving in the other departments mentioned, he has served as judge of the juvenile department. He has taken special interest in juvenile court work; always acting on the theory that it is best to keep boys and girls out of court, out of public institutions, and out of trouble. In pursuance of, and in connection with, that excellent policy, he has adopted the practice of unofficially dealing with young offenders without requiring formal complaint to be made against them, and without permitting any record to be made in such cases in so far as possible, and the result of his work has proved exceedingly satisfactory. The stamp of popular approval of his good work in this and other departments was clearly shown in the last vote cast for him. It has fallen to his lot to sit in judgment in cases involving property and property interests of great magnitude, such as the operation of a railroad through the medium of receivers appointed by him. His early business experience in life, coupled with a sound and discriminating judgment, has proved invaluable in such matters. By way of illustration it should be mentioned that in a case where a railroad was operated by a receiver in his court, after becoming familiar with the old methods of management of the property, he directed the receivers to make such changes in the management, and in the method of promotion and advance-

ment of employees of the corporation, that without detriment to the corporation's business a substantial increase of wages resulted, enabling them to receive a material increase in salaries. Receivers and trainmen alike approved the wisdom of his course.

Judge Frater is a man of profound convictions on all public questions. Upon the bench he is courteous to lawyers and litigants alike, yet firm and decisive in his opinions, thus commanding the well-deserved confidence of bench and bar.

Without doubt, further honors await him. In a growing state like that of Washington, it is more than probable that he will be eventually called to serve upon the supreme bench.

His family consists of a wife, son, and daughter. The son and daughter are graduates of the University of the state of Washington. The son is also a graduate of the University of Washington Law School, and now practising his profession in Seattle. Both children reside at the family home.

Death of Patent Lawyer.

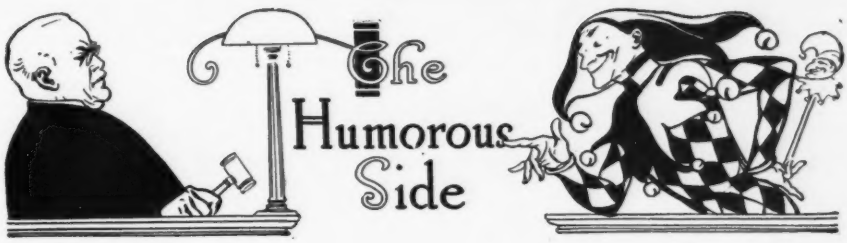
Richard N. Dyer, a patent lawyer, who was for many years counsel for Thomas A. Edison, died at East Orange, N. J., on January 13th. He won the incandescent light case after carrying it to the United States Supreme Court. He prepared the patent papers for the phonograph, kinetoscope and other important Edison inventions.

Indiana Jurist and Educator.

JUDGE Cassius C. Hadley, president of the American Central Law School of Indianapolis, died in that city November 23, 1913, in his fifty-third year. He had been president since June, 1911, and taught Elementary Law and Appellate Procedure. He was universally esteemed by his students and associates.

HON. CASSIUS C. HADLEY

Judge Hadley was graduated from Butler College and from the DePauw Law School. He began practice in Kansas, and was prosecutor of Scott county for two terms. Returning to Indiana he practised at Danville until his appointment as assistant attorney general of Indiana, which position he filled for four successive terms. His chief work was in prosecuting criminal appeals on behalf of the state, the most notable case being the famous Hinshaw case. He was elected judge of the Indiana appellate court in 1906, and served until January, 1911, when he was elected president of the Indianapolis Chamber of Commerce. Soon after his retirement he was appointed by the governor as trustee and secretary of the Indiana Reformatory. He was a member of the Sigma Chi fraternity, in which he was zealously interested. He leaves a widow, but no children.



Good humor is the health of the soul, sadness its prison.—Proverb.

Not So Bad. "Is it true that both your husband and the man who lives next door to you have failed in business?" "Yes, but Ned's failure isn't nearly so bad as Mr. Naybor's. He failed for fifty cents on the dollar, while my husband failed for only ten cents on the dollar."—Boston Transcript.

Hold Fast. In Iowa, a merchant sent a dunning letter to a man, who replied by return mail: "You say you are holding my note yet. That is all right—perfectly right. Just keep holding on to it, and if you find your hands slipping, spit on them and try it again. Yours affectionately."

An Obligation. The following is said to be a copy of a letter sent by a member of the legal profession to a person who was indebted to one of his clients: "Sir: —I am desired to apply to you for the sum of £20 due to my client, Mr. Jones. If you send me the money by this day week you will oblige me—if not, I shall oblige you."

They Found One. "Jury," said a western judge in the old days, "you kin go out and find a verdict. If you can't find one of your own, get the one the jury last used." The jury returned a verdict of "suicide in the ninth degree."

A Surrender. On his eighty-fourth birthday Paul Smith, the veteran Adirondack hotel keeper, who started in life as a guide, and died owning $1,000,000 worth of forest land, was talking about boundary disputes with an old friend.

"Didn't you hear of the lawsuit over a title that I had with Jones down in Malone last summer?" asked Paul. The friend had not heard.

"Well," said Paul, "it was this way. I sat in the court room before the case opened, with my witnesses around me. Jones bustled in, stopped, looked my witnesses over carefully, and said: 'Paul, are those your witnesses?' 'They are,' said I.

"'Then you win,' said he. 'I've had them witnesses twice myself.'"—San Francisco Argonaut.

Wasted Energy. The young lawyer had opened his office that very day, and sat waiting for clients. A step was heard outside, and the next moment a man's figure was silhouetted against the ground glass of the door. Hastily the legal fledgling stepped to his brand-new telephone, and, taking down the receiver, gave every appearance of being deep in a business conversation.

"Yes, Mr. Smith," he was saying, as the man entered, "I'll attend to that corporation matter for you. Mr. Jones had me on the phone this morning, and wanted me to settle a damage suit, but I had to put him off, as I'm so busy with cases just now. But I'll try to sandwich your matter in between my other cases somehow. Yes, yes. All right. Good-by."

Hanging up the receiver, he turned to his visitor, having, as he thought, duly impressed him.

"Excuse me, sir," the man said, "but I'm from the telephone company. I've come to connect up your instrument."—Top Notch Magazine.

Vindicated. "Gentlemen of the jury," announced the attorney for the defense,

"my client is accused of operating a speakeasy. I will have the defendant take the stand."

"Mr. Whistler, are you the defendant in this case?"

"Y-y-y-yess, s-s-sir."

"Will you pronounce your name for the jury?"

"T-t-t-tom-tom-omas Wh-wh-wh-iss-issler."

And without leaving the box the jury returned a verdict of not guilty.—Cincinnati Enquirer.

Her Explanation. There were some deficiencies in the early education of Mrs. Donahoe, but she never mentioned them or admitted their existence. "Will you sign your name here?" asked the young lawyer whom Mrs. Donahoe had asked to draw up a deed transferring a parcel of land to her daughter.

"You sign it yourself an' I'll make me mark," said the old woman quickly. "Since me eyes gave out I'm not able to write a wurrd, young man."

"How do you spell it?" he asked, pen poised above the proper place.

"Spell it whatever way you plaze," said Mrs. Donahoe, recklessly. "Since I lost me teeth there's not a wurrd in the wurrld I can spell."—Youth's Companion.

Could Trust Him. A lawyer got into a cab at the Richmond railway station and said, "Drive me to a haberdasher's."

"Yaas, suh, said the driver, whipped up his horse, and drove a block; then, leaning over to address his passenger, said, "'Scuse me, boss, but whar d'you say you wanter go?"

"To a haberdasher's."

"Yaas, suh; yaas, suh." After another block there was the same performance: "'Scuse me, boss, but whar d'you say you wanter go?"

"To a haberdasher's," was the impatient reply.

Then came the final appeal:

"Now, look a-here, boss; I be'n drivin' in this town twenty year, an' I ain't never give nobody away yit. Now you jes' tell dis nigger whar 'tis you wanter go."—Collier's.

Dear Ancestors. Two close-fisted Missouri brothers sued a neighbor for $375 owing on a land deal. They engaged the best lawyer in their county seat.

The lawyer won the case. The brothers called to see about his fee. One stayed outside and the other went in.

"How much is it?" he asked.

"Well," said the lawyer, "I won't be hard on you. I have known both you boys since you were children, and I knew your pap. I guess $300 will be about right."

The inquiring brother went out dazed.

"Lordy, George," he said to the one outside, "I'm durn glad he didn't know grandpap, too!"—Saturday Evening Post.

Legal Confusion. A Cleveland lawyer tells how, during a trial, one of the jurors suddenly rose from his seat and fled from the court room. He was, however, arrested in his flight before he had left the building and brought back.

"I should like to know what you mean by such an action as this," said the judge, in a lenient tone, however, as he knew the man, an elderly German, to be a simple, straightforward person.

"Vell, your Honor, I will explain," said the juror. "Ven Mr. Jones finished mit his talking my mind vas clear all through, but ven Mr. Smith begins his talking I becomes all confused again already, and I says to myself, 'I better leave at vonce, und stay away until he is done, because, your Honor, to tell the truth, I didn't like der vay der argument vas going."—Cleveland Leader.

Blissful Ignorance. A man went to a judge and asked whether he could bring suit for slander against a man who had called him a rhinoceros.

"Why, certainly," said the judge. "When did he call you that?"

"About three years ago."

"Three years ago! And you only start suit to-day!"

"But, your Honor, yesterday I saw a rhinoceros for the first time."—Newark News.